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"THE NEED FOR JUDICIAL CORRECTIVE IN ADMINISTRATIVE PROCEEDINGS."*

By

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Broadly speaking judicial control is assured where amongst other things review can be had only on the following grounds :

(*a*) *Ultra vires.*—to ensure that the determination by the Tribunal was within the authority delegated to the agency ;

(*b*) *Natural Justice.*—that at least minimum standards of fairness which in the United States is called the 'Fundamentals of Play' are observed.

(*c*) *Substantial evidence,*—That the administrative determination has basis in evidence of rational probative force.

We wish to emphasise that Mr. Justice William O. Douglas summarises his views on administrative Tribunals this wise after due weight and considerations being given to the conditions prevailing in America and India[1]. He said,

" The administrative agency has arrived as a new and honourable member of Governmental hierarchy. It has great work to do in the modern world. It is indeed indispensable. Yet it has created new problems and it has had its share of abuses and malpractices. Reforms of its practices have been numerous. Judicial surveillance has been close[2]. Yet in spite of all reforms and all the surveillance, abuses will continue when there is absent a high standard of the public service.... The tendency to rely more on Courts and less on the administrative agency is illustrated to a degree by the Taft-Hartley Act (61 Stat. 136. 29 U.S.C.) and by the Administrative Procedure Act. Thus the Court in *Universal Camera Corp.* v. *Labour Board,* said concerning the changes made by these Acts; 'The Administrative Procedure Act and the Taft-Hartley Act direct that Courts must assume more responsibility for the reasonableness and fairness of Labour Board decisions than some Courts have shown in the past. Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds."

It is petite to quote the Senate Committee's view respecting the Administrative procedure Act[3]"..........for most practical purposes it is to the agencies that the

* Thesis read on 17th December, 1957, at the Administrative Law Seminar of the Indian Law Institute in Delhi.

1. *Vide*: Tagore Law Lectures pp. 135-136.

2. *See* The Fair Labour Standards Act, 52 Stat. 1060, 29 U. S. C., *Addison* v. *Hooley Hill,* 322 U. S. 607. Section 201.

3. S. Rep. No. 752 79th Cong. 1st Sess. 31.

Congress and people must look for fair administration of the laws and compliance with this bill. *Judicial review is of utmost importance* but it can be operative in relatively few cases because of the cost and general hazards of litigation. It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted. Yet in the vast majority of cases, the agency concerned usually speaks the first and last word. For that reason, the agencies must make the first, primary and most far-reaching effort to comply with the terms and the spirit of the Bill."

The need for judicial review can be best appreciated if we take into account the general criticisms levelled by critics against administrative Tribunals. These may be formulated thus :

1. The administrative bodies are repositories of unlimited and uncontrolled power. There are no checks on them as in the ordinary Courts.

2. The discretionary power is likely to be greatly abused, in contradistinction to judicial Courts where there is ample power to protect from such abuse. Discretion is the least controllable thing in an administrative Tribunal.

3. The administrative Tribunal is a miserable upstart when compared to judicial Courts who have a tradition and clarity of procedure. One critic (Rascoe Pound)[1] said that in the former Rules are not accessible, there is no statement of issues, no segregation of fact from law, no clear sequence from issue to evidence, from evidence to fact findings and from fact findings to determination and there is no real review. There is no public record as in judicial Courts, a public hearing, full argument afforded to each side. As Cardozo[2] said on the other hand a judicial Court is informed by tradition, methodized by analogy, disciplined by system and subordinate to the primordial necessity of order in the social life. In the judicial Court there are findings of fact, a judgment which follows logically from the findings and is in accord with accepted legal precepts, review by a Bench of Judges and opinion by an appellate Court.

4. There is often anonymity in the methods and decisions of a Tribunal. This shakes the confidence of the citizen and saps the responsibility of the administrator. In other words there is no assurance of the competence of the person functioning as a Tribunal not of the methods that are likely to be followed in arriving at a decision.

All the above defects can be in a way met if the personnel of the tribunal has had full judicial tribunal, if there is a prescribed definite statutory procedure to be followed and there is a further safety valve in the provision for judicial review or appeal. The official view in England[3] and America[4] is definitely to control these Tribunals by the ordinary tribunal within certain limits.

TYPES OF CONTROL.

Then the types of control on administrative action has to be considered : (1) Legislative control may not be feasible as it generally has neither the time nor the competence to keep effective control over administrative process. This will be the position even if the Legislature was free from any executive domination. As the activities of Government has enormously increased the Administrator's power, the common law states such as India cannot be enthusiastic in setting up administrative Courts either of the French or German Pattern.

(2) The second type of control by superior administrative officer is also no good. It is in a way only 'self control' which is not so easy to achieve.

1. *See* his treatise on Administrative Law (1942), pp. 60-62.

2. His work 'The Nature of the Judicial Process' P. 141.

3. *Vide*: The Reports of the Committee on Minister's Power in 1932 and 1953.

4. The Attorney General's Committee on Administrative Procedure P. 209 U.S.A. Appointed by the President in 1939 and it issued a final report in 1941. *Vide* also the Benjamin Report on Administrative Procedure. State of New York 56 Har. L. Rev. 704.

(3) Judicial Control is the only feasible thing as it is impartial, clear cut by tradition and competency. Really administrative action requires supervision from three points of view *i.e.*, public welfare, administrative efficiency and private interests immediately affected by administrative action. Only judicial control can view the matter in this perspective and achieve the maximum result for each of these three objectives.

Law and administration differ in their concept and purpose. Thus Mr. Pound[1] says "Administration achieves public security by preventive action. It selects a heirarchy of officials to each of whom definite work is assigned and governed by ends rather than rules. It is personal. Hence it is often arbitrary and is subject to the abuses incident to personal as contrasted with impersonal or law-regulated action. But well exercised it is extremely efficient, always more efficient than the rival agency can be. Law, on the other hand, operates by redress or punishment rather than by prevention. It formulates general rules of action and visits infractions of these rules with penalties. It does not supervise action. It leaves individuals free to act but imposes pains to those who could not act in accordance with the rules prescribed. It is impersonal and safeguards against ignorance, caprice or corruption of magistrates. But it is not quick enough or automatic enough to meet the requirements of the complex social organisation."

So then while we can be sure of law and Courts of justice to deal with them, there is no such certainty in respect of administrative process and it is therefore we plead for an ultimate judicial corrective being always available in respect of an administrative action or an administrative judgment by a Tribunal.

Nature of Judicial Control.

The control by Courts of administrative orders or judgment can arise from various factors, such as

1. Unconstitutionality of the statute under which the Tribunal acts. This will mean judicial review of the very legislation. But judicial control of administrative action will exclude such judicial review of laws passed by the legislature.

2. Relief against illegal administrative action in the preventive or curative form. The former is achieved by direct controls such as the (1) extraordinary legal remedies, by *Habeas Corpus*, *Mandamus*, *Certiorari*, Prohibition, *Quo warranto*, etc.,

(2) equitable remedies such as injunction and declaratory acts;

(3) special statutory appeals to the Courts. The curative relief lies in getting an award of compensation for the injury suffered under an illegal administrative action.

3. In the punitive form the control may be by criminal proceedings to punish an officer for acts which amount to offences.

When we speak of judicial control *vis-a-vis* administrative Tribunals we should naturally refer to category 2 above. The other categories do not arise directly for our study here.

The Need for a Code in India.

If at all in India we must need have administrative Tribunals, the vital question will be to regularise the procedure by a clear code on the lines of the American model. Otherwise standards of trial, hearing, evidence, etc., will vary from Court to Court leading to much confusion and conflict. The elusive phrase of 'principles of natural justice' may not be enough to safeguard the citizen's rights. We will plead for a written code which will provide:

1. Notice in all matters to the aggrieved parties;
2. Absence of bias in the deciding authority;

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1. Roscoe Pound: Inherent and acquired Difficulties in the Administration of Punitive Justice (1907) Proceedings of the American Political Science Association, Vol. IV, P. 232.

3. Right of party to be represented and aided by counsel ;

4. the decision of the tribunal should set forth the findings and conclusions together with reasons or basis therefor on all material issues of fact, law or discretion presented by the record;

5. Parties should be given the facility to get copies of these decisions and the reasons therefor. An epitome of leading cases also should be published.

6. The administrative officers should be from persons with adequate legal knowledge.

7. If the administrative agency itself does not conduct the initial hearing, the dual function of hearing and decision which have to be discharged by different officials within the administrative agency, may be assimilated to those of original and appellate Courts. If such officers do make the initial decision, in case there is no appeal or review to the agency is provided, such a decision shall be deemed to be the decision of the Agency itself : *vide* section 8 of the American Federal Administrative Procedure Act.

8. A right of appeal to the High Court on questions of law.

9. The fact finding Tribunals who assist the Minister of a concerned department should be manned by persons with adequate legal or judicial training. This alone will aid the determination of facts upon which the discretion has to be exercised. They would also aid in the determination of points of law which may need investigation.

NEED FOR JUDICIAL REVIEW.

How far the existence of special Tribunals was contrary to the Rule of Law theory was answered by Wade and Godfrey Phillips this wise:—(*Vide*: Constitutional Law, by Wade and Godfrey Phillips, Third Edition, page 46).

"It is submitted that the Rule of Law is satisfied provided that the Tribunals are impartial and independent ; that every man is heard before a decision is given affecting his rights ; the reasons are given for decisions and reasonable regard is paid to precedent. It is inconsistent with a Rule of Law that a judicial issue should be decided by a minister interested in carrying out a policy affected by the issue to be decided. Judicial decisions not referred to the ordinary Courts should generally be entrusted to a tribunal with a chairman with legal qualifications and on points of law there should be provisions for an appeal to the Courts, *e.g.*, whether or not an individual comes within the definition of an injured person. The essential requirements are, however, that decisions should be impartial and that those who give them should not be liable to pressure from the executive."

Lord Green, M.R. in his Haldane Memorial Lecture on " Law and progress" posited that in all cases before a special Tribunal " there should be a right of appeal to the Court on questions of law. In no circumstances should the power of Court to restrain a special Tribunal from exceeding its jurisdiction be taken away."

Harold, J., Laski put it "Where executive itself exercise quasi-judicial functions the judiciary should have such power of scrutiny as will enable it to see that the rules adopted by the executive are such as are likely to result in injustice. Executive discretion is an impossible rule unless it is conceived in terms of judicial standard". In *Dyson* v. *Attorney General*[1], Farwell, L.J., observed that the Courts are the only defence of the liberty of the subject against departmental aggression.

The significance and importance for judicial review arises thus. Judicial review ensures smooth and integrated working of the three partners of the State, the Executive, the Legislature and the Judiciary. This is very essential to any democratic form of Government which cannot thrive except on a well conceived balancing and separation of powers. America has succeeded in her constitutional develop-

1. L.R. (1911) 1 K.B. 410.

ment on account of the recognition of judicial review. England has also kept a continuous constitutional growth on account of the importance given to Judicia Review. The growth of mere executive power is not really a danger if it is canalized within banks of Judicial Review which alone can keep it from over-flowing. The success of Judicial Review rests on a well drafted Constitution which gives it a duly honoured place and also on the calibre of the Judges themselves.

It is worthwhile to quote the observation of Jackson, J., in an American case *Youngstown Sheet and Tube Company* v. *Charles Sawyer*[1]. What applies to the Constitution of America is equally applicable to the Indian Constitution which is similar to the former in many respects :

"The essence of the free Government is leave to live by no man's leave underneath the law........to be governed by those impersonal forces which we will call law. Therefore our Government is fashioned to fulfill this concept so far as humanly possible. The executive except for recommendation and veto has no legislative powers......with all its defects, delays and inconveniences men have discovered no technique for long preserving free Government except that *the executive be under the law and that the law be made by parliamentary deliberation. Such instruction may be destined to pass away but it is the duty of the Court to be last,* not first *to give them up.*

These are indeed golden words, clearly demarcating the spheres of the Executive, the Legislative and the Courts.

PRINCIPLE OF JUDICIAL REVIEW TO BE SAFEGUARDED BY COURTS.

The need for a clear provision for judicial review had been repeatedly stressed by eminent Judges in India and England. Patanjali Sastri, C.J., (vide: *State of Madras* v. *V. G. Row*[2], clearly and forcibly posited that " it is the sacred duty of Courts to apply properly and fearlessly the principles of Judicial Review to safeguard the rights of the parties arraigned in a cause. He said "Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed powers of reviewing Legislative Acts under cover of the widely interpreted due process clause of the Vth and XIVth Amendments. If then the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon by the Constitution. This is especially true as regard the fundamental rights as to which this Court has been assigned the role of the sentinel on the quivive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an inpugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the Courts in the new set-up are out to seek clashes with legislatures in the country."

It is petite to quote Harold, J., Laski :[3]

"Where the executive itself exercise quasi-judicial functions the judiciary should have such power of scrutiny as will enable it to see that the rules adopted by the executive are such as are likely to result in justice. Executive discretion is an impossible rule unless it is conceived in terms of judicial standard."

In *Dyson* v. *Attorney General*[4], Farwell, L.J., pithily asserted:

"If ministerial responsibility were more than the shadow of a name, the matter would be less important; but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.'

Justice Raghava Rao of the Madras High Court aptly said[5] :

1. 343 U.S. 579.
2. (1952) 2 M.L.J. 135 : 1952 S.C.J. 253.
3. *Vide* Grammar of Politics IVth Edition, P. 30.
4. L.R. (1911) 1 K.B. 410 at 424.
5. *Vide* Inaugural Address : Diamond Jublee of the Palghat Bar Association, (1950) 1 M.L.J. (Journal) 49.

"Situations of conflict arise between the liberty of the individual and the authority of the State which it falls to the lot of Judges as guardians of the one as well as the other to help resolve by checking the excesses in individual conduct as well as in Governmental functioning with due emphasis on the responsibility as well as the rights of the State and the citizens alike in their relation towards each other...... The poise between the scales of the balance in situations of conflicting forces swayed by conflicting ideologies is by no means easy to achieve. It is in the achievement of such poise, however, that the peculiar privilege and great glory of lawyers and Judges lies with the bent of mind which their tradition and training gives them of a happy mean between the instincts of conservatism and progressivism and which qualifies them to keep the balance wheel of the Constitution going in the manner most conducive to the largest good of the State and the citizen."

As we stated elsewhere under the present Constitution of India, judicial control of administrative agencies is derived by the operation of Articles 136, 139, 32, 226 and 227. The plan of the Indian Constitution strikes a balance between social security and individual liberty. Special care is also taken to see that this individual liberty does not degenerate into license. The India Union is a Federation with a strong centre. The design of the executive set up is to make the cabinet at the Central and State level backed up by its political majority to forge ahead all schemes to further the progress of the welfare State. The parliamentary type of executive under the present practice of party system (now a dominant and only one political party well knit and organised) does indeed make the legislature a creature of the executive. When such is the case the need for judicial control is doubly needed. The Constitution further itself appears to make feasible the creation of important administrative agencies. Articles 301 to 307 which envisage an inter-State commerce authority can in a few years herald a mighty administrative agency. The Tribunal envisaged under Article 263 (1) in respect of Inter-State Water Supply and Distribution, may soon acquire great administrative importance. Though Article 262 (2) excludes control by Courts in such disputes, in course of time when power projects and irrigation schemes inter-State acquire special importance leading to controversies, Parliament may be driven to the necessity of directing the appointment of a High Court or Supreme Court Judge on the Tribunal. May be, it may also keep the door for at least a limited Judicial Review.

LEGISLATIVE EXCLUSION OF JUDICIAL CONTROL.

Administrative finality which would brook of no judicial corrective is indeed very hazardous to the growth of a civilized Welfare State. As we had already pointed out in England, as the Parliament is Supreme and is itself a Court also, its statutes empowering administrative finality cannot at all be questioned. But even there Courts scan the statute very minutely and if the power given is not in clear terms, they do not hesitate to interfere under their Review powers.

In America it is different for administrative finality is a constitutional impossibility since there is a charter of fundamental rights. The Attorney-General of America rightly posited[1]: "Where even legislative action is subject to judicial veto, there has been little question as to the propriety of judicial review of Administrative Action." The principle of Judicial Review has found its acceptance in section 10 (*a*) and (*c*) of the Federal Administrative Procedure Act, 1946.

In India the Constitution of 1950 has placed the position as similar to that obtaining in America. There may be some difference in the scope of the Judicial Review. We may state that a guarantee of Fundamental Rights in Part III of the Indian Constitution is irreconcilable with the concept of any administratives finality. For the limitations of the Fundamental Rights are clearly made justiciable. The application of Articles 32, 226, 227, 136 and 139 is only to ensure a judicial corrective through writs and appeals. It may be stated that Article 226 applies to questions of '*ultra vires*' which term can include also 'violation of natural justice.' Even where there is legislative exclusion of Court review, the High Court can inter-

1. *Vide* Attorney General's Committee on Administrative, Procedure, p. 75.

vene under Article 226 for manifest defect of jurisdiction and for manifest fraud. Obviously Articles 226 and 227 being above the control of ordinary legislation, the superintending power of the High Court stands fully protected from legislative exclusion. Under Article 226 the High Court has power to prevent excess absence and abuse of jurisdiction and patent errors of law of tribunals. The Judicial Court has the power to satisfy that the preliminary conditions necessary for the validity of administrative action, has been fulfilled.

It may be noted that the attitude of Courts in interpreting the statutory provisions conferring administrative finality fluctuates on three aspects:

(1) On the subject-matter of legislation.

(2) On the nature of the individual right affected by the administrative action;

(3) the quality of administrative justice dispensed under the statute.

Thus in matters affecting revenues of the State the Judges appear to be liberal with the exclusion clause. If it is one affecting proprietary interests the leaning is towards the person affected. But if it is a case of personal liberty then the Court is very strict in interpreting clauses that exclude Court review. If the administrative tribunals are incompetent a very narrow interpretation of the exclusion clause is sought to be made. The question generally poses, is there no fixed rule of statutory interpretation? We have to console ourselves that of the three organs of the State, the Legislature, the Executive and the Judiciary, the last named is the least liable to abuse any extension of its powers. So Courts should be always on the quivive to correct manifest errors of law and any miscarriage of natural justice. It must be clearly understood that the scope of a judicial control can be limited only by the requirements of justice.

THE EXECUTIVE IN INDIA.

While adverting on the subject of administrative Tribunals, one has to stress one general aspect of a well founded criticism, that whatever justification there may be for these Tribunals to meet special situation the executive had always more confidence in these Tribunals than in the High Courts as the latter were inclined to be too aloft judicially and consequently more critical of administrative lapses. While the executive are overzealous in ushering in more of the pattern of administrative Tribunals, the citizen was naturally doubtful whether his interests were safeguarded in any conflict with the State as such. In such a contest one wishes the Indian Constitution had a clear provision which at least assured the citizen that the executive can act only under the law and that if there was any executive action without legal authority it is not binding. This will be in keeping with the spirit of what Jackson, J., said in the above quoted American case—*Youngstown Sheet and Tube Company* v. *Charles Sawyer*[1].

Articles 53 and 154 of the Indian Constitution vest the executive power of the Union and of the States in the President and in the Governor respectively to act in accordance with the Constitution directly or through subordinate officials. In the original draft Constitution the words used were 'in accordance with the Constitution and the law'. The rule of Law would in the latter event be paramount and the executive could not then invoke any inherent power apart from the law. The American theory claiming inherent power to the President had a disclaimer in the later case above quoted where Jackson, J., clearly posited that the executive should always act under the law and not apart from it. While the position is such in America and England it is a pity that in Article 53 of the Indian Constitution the words "under the Law" has been omitted. If the Government is anxious to remove public apthy, it is urgent that an amendment of Articles 53 and 154 in the above direction is necessary. If the Government do not do this and go ahead with the formation of administrative Tribunals on the French pattern public confidence may be rudely shaken.

1. 343 U.S. 579.

There is however one provision, Article 256 of the Indian Constitution which posits : The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose." This is indeed good so far as it goes that the executive shall see that the Law of the land is obeyed and the rule of Law as respected. But there is nothing in our Constitution to prevent the executive claiming inherent powers apart from the law and which do not offend any law in force. That is not a very enviable position. If administrative Tribunals are introduced and the citizen is compelled to seek that forum only for any action against the State the need for making the executive act only under the law and not apart from it will be more immediately felt.

COMMON LAW STATES AND PREROGATIVE STATES.

States may be divided into two types as C.F. Strong puts it :

(1) Common Law States in which the executive being subject to the operation of the Rule of Law is unprotected. (2) Prerogative States in which the executive is protected by a special system of Administrative Law. Britain is a unitary State with a flexible constitution, a legislature elected on adult suffrage, with single member constituencies, a non-elective second chamber and a parliamentary executive subject to the Rule of Law. America is a Federal State with a rigid constitution a legislature elected on adult suffrage with single member constituencies and an elected second chamber and a non-Parliamentary executive subject, to the Rule of Law. India follows a middle pattern. It is quite federal, with a rigid written constitution, a legislature elected on adult suffrages, with single member constituencies with a second chamber elected by the popular legislature with a Parliamentary executive subject to the Rule of Law.

So our concept of a Federal States following the American pattern to a great extent, cannot but be subject to the Rule of Law. We are not a prerogative State functioning under Administrative Law where the executive are unduly protected. France is undoubtedly a prerogative State where such Administrative Law has been perfected. It is not proper that India should copy the French pattern as it will not suit a Federal Democracy. But India may consider some good aspects of Administrative Law within a limited sphere, always giving a wide margin for Judicial Review of all orders of Administrative Tribunals on points of law at least. We may yet value Dicey's dictum " That no man is above the Law and that every man, whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary Tribunals."

NEW JUDGE OF THE MADRAS HIGH COURT.

The appointment of Sri S. Ramachandra Ayyar, a senior and respected member of the Madras Bar and an Advocate of the Supreme Court of India, has been received with uniform approval by one and all. Apart from the news floating in the air during the past few weeks, the elevation of Sri Ramachandra Ayyar to the Bench was talked of as a matter of course for the past some years. He has been a leading practitioner on the Appellate Side of our High Court for over a decade and a half and has appeared in several cases involving intricate questions of law. Enrolled in 1927, he has worked as a junior under Sri K. S. Krishnaswami Iyengar, an able lawyer with extensive practice, who became the Government Pleader of Madras and then a Judge of the High Court later.

Born in 1904 in Kumbakonam Taluq of Tanjore District, Sri Ramachandra Ayyar had his early education in several of the southern districts of the State where his father Sri S. P. Subramania Ayyar served as a member of the State Judicial Service till he retired as a Subordinate Judge. He had his University education in the Pachayappa's College and the Law College at Madras. Tall and thin, with sharp eyes and intellect, a catholic outlook and reserved character, he is of quite a social and clubbable type but never forces himself on any company or group. Belonging to an orthodox family and brought up in the traditional ways he is learned in the Vedas and is of a pious and charitable disposition. He has no diversions as commonly understood in modern society. He has been serving the 'jealous mistress'—the Law—'scorning delight and living laborious days'. With no great adventitious circumstances he has built up a steady and lucrative practice in the course of years by intrinsic worth and hard work and has earned a high reputation for his able advocacy and great integrity. His elevation to the Bench of the High Court is but a due recognition of well deserved merit.

He will be serving a full term as a Judge and we are sure that he will add to the high traditions and reputation which the Madras High Court has earned for its learning and efficiency under the guidance of eminent Chief Justices and other Judges. Coming as he does, with a rich experience at the Bar, he will be an able and popular Judge.

We join the large number of his friends, admirers and colleagues in offering our felicitations to the learned Judge and convey our sincere prayer and good wishes to his Lordship for a happy and successful tenure of office in his new assignment.

DEPT. OF LAW UNIVERSITY OF CALCUTTA NOT TO BE REMOVED

A LAW SUIT THAT WAS ADJOURNED FOR A HUNDRED YEARS !

By

SRI S. VARADARAJULU NAIDU.

District and Sessions Judge of Ramanathapuram at Madurai.

It is a matter of history that the ancient Athenians, fortunately blessed with secular justice, had justice dispensed with usually at the market place at the meetings of the popular assembly called " Ecclesia ". " Ecclesias ", when conducting trials, were like Juror-Courts of the present day, with this differrence, that the Athenian Jurors were Judges not merely of fact, but also of law. Sometimes the Athenians held their Courts, instead of at the Agora or the market place, on the Areopagus Hill, and the Pnyx Hill. The Tribunal of the Areopagus had as its motto, the words of the Goddess Athena, " This Court, majestic, incorruptible, the sleepless watcher of my land I set."

Before such a Tribunal with such a motto, a law suit had to be adjourned for a hundred years; when the Juror-Judges were puzzled, and were unable to decide the issue. Protagoras, the teacher of Forensic Oratory, made a contract with his pupil Evalthus that his fee should be payable when the young man won his first law suit. After a while the lessons ceased, and the teacher pronounced the pupil competent ; but the pupil insisted that he was not. The teacher cut the Gordian-knot and sued the pupil for his fee. The teacher pleaded thus : " I win either way ; for if the judgment is for me, he must pay ; but if it is for him, he has won his first suit and under the contract he must therefore pay." His pupil pleaded in reply. " I win either way ; for if the judgment is for me, I am not liable and if the judgment is against me, I have not yet won my first suit ". It is these conundrums—rare gems of skill in argument—that puzzled the Juror-Judges of the Areopagus, with the result that they sought refuge out of the dilemma by adjourning the suit for a hundred years !

Of course, the History of the Athenians has not chronicled that the suit was heard again, between the later successors-in-interest of the teacher and of the pupil !

Letter to The Editor.

ENROLMENT OF PLEADERS AS ADVOCATES.

Sir,

The enrolment of the Pleaders as such ceased in 1931, and afterwards compulsory enrolment of Advocates began to be enforced. The Government is now pleased to amend the Stamp Act and reduce the fee for enrolment as Advocate to Rs. 50. The pleaders who desire to enrol themselves will be not less than 50 years of age. They have already parted with a heavy sum by way of getting sanads and renewal every year during all these years. In the above circumstances it will be desirable that pleaders who now seek to enrol themselves as advocates may be spared the fees to the Bar Council for enrolment and they may also be permitted to enrol themselves before the respective District Judges so that there need not be any costly journey expenses to enrol themselves before the High Court at Madras. I hope that the authorities concerned will facilitate the entire pleaders in the Presidency to enrol themselves as Advocates with a minimum expense.

N. Srinivasa Iyer.
Advocate, Madurai.

Department of Law Lib
Acc. No. 726323
Date..............
C. U.

DOES ARTICLE 226 OF THE CONSTITUTION NEED ANY AMENDMENT?*

By

S. M. SIKRI, *Advocate-General, Punjab.*

I will first explain why I selected this limited topic. First judicial review of administrative action under Article 226 of the Constitution is becoming suspect without realising its transcendent and fundamental importance in our Constitution and without a detailed investigation of how it has worked in practice since 1950, when the Constitution came into force. Secondly, my experience—I have since 1951 appeared for my State and the Union of India in hundreds of cases involving judicial review of administrative action—does not justify this suspicion. I feel that careful investigation and research should be undertaken before it is decided to perform a major surgical operation on Article 226 of the Constitution. There is no doubt that there are some defects, but these, I feel, can be remedied by a minor operation.

For the purpose of this paper, I will take administrative action to mean any action of the administration, including Tribunals, whether it is legislative, judicial or quasi-judicial or executive. This is in accordance with the definition of administrative law given by Wade[1] as "the whole body of law which determines the organisation, power and duties of administrative authorities". This definition is accepted by Friedmann in "Principles of Australian Administrative Law," p. 28.

The scope of judicial review has been authoritatively settled by the Supreme Court in a series of judgments: *Veerappa Pillai* v. *Raman & Raman Ltd.*,[2]: *Ebrahim Aboobakar* v. *Custodian General of Evacuee Property*[3], *Basappa* v. *Nagappa*[4], *Hari Vishnu* v. *Ahmed Ishaque*[5], *Bengal Immunity Co.* v. *State of Bihar.*[6] *Thangal Kunju Musaliar* v. *Venkatachalam Potti.*[7] Apart from the question when there is an error of law apparent on the record, the law is clear. It is to the actual exercise of the powers by the High Court that I address myself to find out whether the public interest or the interest of the State is being adversely affected by the exercise of these powers and whether any other body or tribunal constituted in a different manner can accomplish what has been achieved by the High Courts both directly and indirectly.

I will first deal with the supreme importance of Article 226 in the Constitution. The humble citizens approach the High Courts under Article 226 in the same manner and with the same expectation and deference as they did the Rajas of old who could not only be appealed to in person but who could remove any injustice. It is impossible to imagine that any tribunal differently constituted will ever command this appeal and deference. Justice must not only be done and seem to be done, but there must be an instinctive feeling that it is sublime justice, and this feeling can never be nurtured in the citizens when the person administering justice has not that halo around him, which centuries of tradition have placed on our Judges. The shadow of our past famous Judges and famous English Judges not only impels each Judge to administer justice without fear, but gives an invaluable sense of confidence and freedom to the people. What Lord Denning, says,[8] 'If there is one thing above all others, of which the Englishman can be sure, it is that the Judges are independent of the executive', applies equally to India.

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* Thesis read at the Administrative Law Seminar, Delhi, on 14th December, 1957.

1. Appendix I to Dicey, pages 475 to 484.
2. 1952 S.C.R. 583 : (1952) S.C.J. 261 : (1952) 1 M.L.J. 806.
3. 1952 S.C.R. 696 : (1952) S.C.J. 483.
4. (1955) 1 S.C.R. 250 : 1954 S.C.J 695.
5. (1955) 1 S.C.R. 1104 : (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157.
6. (1955) 2 S.C.R. 603 : (1955) S.C.J. 672: (1955) 2 M.L.J. (S.C.) 168.
7. (1955) 2 S.C.R. 196 . (1956) S.C.J. 223.
8. 'Freedom under the Law', p. 82.

Articles 226 and 32 may indeed be termed the two symbols of this great democratic Republic which the Indian people have created. Destroy these two and you will destroy the precious confidence of a free people who I can hear saying "we cannot be oppressed under our Constitution. Our Judges, on whom we have conferred the judicial content of our sovereignty will see to it that every action of the executive is warranted by the Constitution and the laws made under it."

Nothing in our history has channelled administrative action into lawful channels more than Article 226. Each executive officer not only knows of its existence, but knows its long reach and its efficacy. If he has any doubt about the legality of anything he is going to do, he will invariably consult the Law Department.

The Law Secretaries will tell you about the consequent tremendous increase of opinion work. Let it be said to the credit of the administration that legal advice is invariably followed. Remove Article 226 and you will see a gradual deterioration in the legal standards of administration. The threat of a suit or an appeal to a higher administrative authority has no such preventive effect. It may be that the executive officer knows he will not be occupying the same office when the suit or appeal is decided years afterwards. It may be that the High Court, with all its dignity and plenary powers, ever ready to inquire into his acts if a *prima facie* case is made out, overawes him. But whatever the reason, Article 226 does affect him. It tells him " Be careful. Act according to Law. There is no place for arbitrary and illegal action under our Constitution". A suit or an appeal simply does not give this message to him.

The High Courts in India have disposed of thousands of cases under Article 226 of the Constitution since 1950. This is a rich field for a research scholar to delve into. I have, for the purpose of this paper, as a sample, looked into all the cases filed in the High Court in 1955 and decided against the Government. I have examined them in detail in the Appendix to this paper. I considered these cases to see if there is any justification for the Administration to fear review of its action by the High Courts. It is this fear which led to the creation of Administrative Courts in France. As Lord Denning says[1] "The State there seems to have suspected the ordinary Courts of a spirit of hostility towards it so that it could not obtain justice in them, with the result that it had gone much further than we have in taking away work from the ordinary Courts". I find that the State does get justice in the High Courts. It will be seen from a perusal of the Appendix that the High Court has interfered justly. An Administrative Court worth its name would, in most cases, have interfered too. The only difference, I imagine, between the decisions of an Administrative Court and a High Court would be the desire of the latter and the absence of this in the former, to see that the end even though justified is achieved by just means, *i.e.*, by a procedure which the Law sanctions. But is not this what Mahatma Gandhi taught us? Just means in the legal sphere can only connote procedure sanctioned by the Law and the Constitution. Even regarding this, the High Court does not interfere unless the adoption of the illegal procedure has caused manifest injustice to the petitioner.

However, in one matter, I feel that the Administration is justified in expressing alarm, and that is the effect in some cases of stay orders which are issued after petitions are admitted to a hearing by the High Court.

Once a petition raising a question affecting a large number of persons is admitted in the High Court, invariably a large number of petitions follow and if the question concerns a revenue collecting department like the Income-tax Department or the Sales Tax Department or a department carrying on some beneficial activity like the Department of Consolidation of Holdings or administering an Act like the Employees' Provident Funds Act, the effects are disastrous on the administration of the department, if the High Court issues interim stay orders. The department has in some cases literally to sit idle till the question is decided by the High Court and per-

1. "Freedom under the Law", p. 78.

haps by the Supreme Court. This takes time. Sometime if the question raised involves determination of the fundamental rights a petition is filed in the Supreme Court which issues a stay order. After this a large number of petitions follow in the High Court on the same pattern and the High Court also issues stay orders. The Government naturally gets impatient. It is keen to get on with the administration and the carrying on of beneficial activities, but feels helpless. In some cases it and its legal advisers know that there is no likelihood of the point prevailing in the High Court or the Supreme Court. In other cases, where the point is fairly arguable and the question is only one of the interpretation of an Act or Rules made under it, the Government knows that it will bring in amending or curative legislation to get over the difficulty if the decision of the High Court is against it, and the Government feels that the administration is being held up unnecessarily. Even if the question is one of fundamental rights, Government feels it will be able to achieve the object of the legislation by other means. Reference is invited to case No. 9 in the Appendix. What is the best method of getting over the difficulty? Surely not an amendment of Article 226 or Article 32, taking away the jurisdiction of the High Court or the Supreme Court completely. Would an amendment of Article 226 somewhat on one of the following lines solve the difficulty.

" (a) Provided that the High Court shall revoke or vacate a stay order if the Advocate-General certifies that the stay order will in the opinion of the Minister concerned adversely affect the public interest and concerns the revenue of the State or Union of India or concerns such department as may be prescribed by Parliament or the Legislature of a State by law."

The High Court would, where a stay order has been vacated under this provision, give top priority to the disposal of the case or cases.

A similar amendment of Article 32 would also be necessary.

I must confess I have not been able to find an exact precedent for this suggestion. In the United States there is a limited provision for preventing the Courts from interfering with the levy and collection of taxes. In 319 U.S. 293 reference is made to an Act of August 21, 1937. 50 Stat. 73 C. 726 enacted as an amendment to section 24 of the Judicial Code. 28 U.S. C.A.S. 41 (1) : 8 F.C.A. like 28 S. 41 (1). This provides that "no district Court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, efficient remedy may be had at law or in equity in the Courts of such State." I have not been able to trace a similar provision, which I believe exists, dealing with taxes collected by the United States Government.

On the other hand the American Administrative Procedure Act 60 Stat. 237 (1946) by section 10 (e) enables both an agency and the reviewing Court "to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." In cases except where statutes preclude judicial review or agency action is by law committed to agency discretion (Gellhorn & Byse, page 301).

Section 67 of the Indian Income-tax Act provides that "no suit shall be brought in any civil Court to set aside or modify any assessment made under this Act." The Privy Council gave it a wide interpretation in *Raleigh Investment Co., Ltd.* v. *Governor-General in Council*[1]. The Supreme Court, however, limited the scope of a similar provision in the Bengal Agricultural Income-tax Act, 1944.—*The State of Tripura* and the *Province of East Bengal*[2]. It held that as no assessment had been made, a suit for a declaration that the Bengal Act was *ultra vires* and void was competent.

In India innumerable Central and State Acts have sections barring suits.

Section 226 (1) of the Government of India Act was in the following terms :

" Until otherwise provided by the Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue or

1. (1947) L.R. 74 I.A. 50 : (1947) 2 M.L.J. 16: 15 I.T.R. 332 (P.C.).

2. (1951) S.C.J. 70: (1951) S.C.R. 1.

concerning any act ordered or done thereof according to the usage and practice of the country or the land for the time being."

But in *Alcock Ashdown & Co.* v. *Chief Revenue Authority of Bombay*[1], the Privy Council sanctioned the issue of a *mandamus* to compel the authorities to carry out the procedure prescribed by the Income-tax Act.

The question is really one of Public Interest. Is Public Interest served by a law which enables the High Courts to issue stay orders and enjoin the collection of Revenue? If the law does not, it should be changed. In a Welfare State, spending large sums of money not only is it imperative that taxes should be collected speedily but that its beneficial activities should be carried on unhampered though within the law.

I may make it clear that I do not suggest that no administrative tribunals or agencies should be created. Let the State create as many tribunals and agencies as it likes, but let the agencies and tribunals be subject to the supervisory jurisdiction of the High Court and ultimately of the Supreme Court.

I will now mention one defect in our system which I have noticed while dealing with cases under Article 226. In one respect the High Courts do not afford justice to the citizen, and it is essential to devise a machinery that will rectify this injustice. The High Courts in India have not yet adopted the "substantial evidence" rule evolved by the Courts in the United States. (*See* Gellhorn & Byse, page 426 *et seq.*). They do not go into disputed questions of fact. Although the Punjab High Court has framed rules which enable it to permit evidence to be led, I cannot remember one instance in which this power has been exercised. The result is that hopeless findings of facts are allowed to say and determine rights. There is one way of solving the difficulty, and this is that the agency should follow a prescribed procedure and be required to keep a record. But there is one aspect which must be borne in mind, and is forcibly put by President Roosevelt in his veto message on the Walter-Lagon Bill[2]:

"It is impossible to subject the daily routine of fact findings, in many of our agencies to Court procedure. Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often traps for the unwary and technical rules of evidence often prevent common-sense determinations on information which would be regarded as adequate for any business decision...... It is characteristic of these tribunals that simple and non-technical hearings take the place of Court trials and informal proceedings supersede rigid and formal pleadings and processes. A common-sense resort to usual and practical sources of information takes the place of an archaic and technical application of rules of evidence and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and to the leading case." He admitted that with the objective—the assurance of fairness in administrative proceedings—there will be universal agreement. 'The promotion of expeditious, orderly and sensible procedure in the conduct of public affairs is a purpose which commends itself not only to the Congress and the Courts but to the executive departments and administrative agencies themselves.'

Some of our Acts do prescribe a procedure which ensures that findings of fact are arrived at in a proper manner, but others prescribe no procedure. In such cases one cannot be assured of the soundness of findings. I have known of a District Magistrate concluding that a house is vacant on the report of an inspector, who had only asked some by-standers—names not in the report—near the house, and a report not seen by the owner of the house. The fate of most cases is decided when the facts are found. An executive officer might well say: "Let me decide the facts and I do not care who decides the principles."

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1. (1923) L.R. 50 I.A. 227: I.L.R. 47 Bom. 742 (P.C.).
2. *Davis*: Cases on Administrative Law, p. 48.

The experience of our American friends can be of great assistance to us in this matter. I only pose the problem which is shown to exist in India from my experience of judicial review under Article 226.

To conclude, my plea is this. Our Constitution-makers have fashioned great instruments of justice in Articles 226 and 32 of the Constitution. Let us pass these on—great symbols and a great heritage—to posterity.

APPENDIX.

I will take one by one the cases decided against the State.

(1) C.W. No. 219 of 1955.—*Ram Dass Passi* v. *State of Punjab*, dated 27th December, 1955.

The interpretation of section 3 (1) of the Punjab Municipal Executive Officers Act, which provided that the Committee shall appoint an Executive Officer a person "with the approval of the State Government for a renewable period of 5 years." The Punjab Government approved the appointment of the Executive Officer but reduced the period of appointment to less than 5 years. The High Court held that it could not. The facts were admitted and the only question was as to the precise powers of the Government under the Act.

(2) C.W. No. 188 of 1955.—*Chanchal Singh, etc.* v. *State of Punjab*, dated 25th March, 1957.

The petitioners were in possession of certain lands situated in village Sarja Mirza on the eastern side of upper Bari Doab Canal near Ferozepore. The district authorities requiring the land for the Punjab Additional Police and thinking that the petitioners had no right to the lands attempted to eject them. The High Court held naturally that the petitioner could not be ejected in this manner. The petition was not disposed of till 1957 because the District Authorities took over a year to file an affidavit in reply. The High Court had issued an interim stay order, and therefore the delay did not prejudicially affect the petitioners but without an immediate stay they would have had to file a suit after being ejected and the litigation would probably be still going on.

(3) C.W. No. 386 of 1955.—*Shiv Karan Singh* v. *Competent Officer, Hissar*, dated 20th September, 1956.

A sale of land had been effected under section 10 (*b*) of the Evacuee Interest (Separation) Act, 1951, which enables the Competent Officer to sell a property.

The petitioner had purchased the land and the Competent Officer had in accordance with Rules framed under the Act confirmed the sale and issued the sale certificate. Later, on the application of an interested party, filed after great delay, the sale had been set aside. The High Court upheld the contention of the petitioner that the sale could not be set aside. No rule provided for this to be done. No suit was competent under the Act (section 18) and the petitioner had no other remedy except under Article 226 of the Constitution. The facts were not much in dispute and the case could be decided on the interpretation of the Act and the Rules.

(4) C.W. No. 45 of 1955.—*Lumsden Club* v. *Punjab State*, dated 29th June, 1955. (1956 P.L.R. 426).

The petitioner was a club in Amritsar and a notification had been issued by the Government which prevented the sale of foreign liquor in the clubs. This notification was however made applicable only to Civilian Clubs. Both the Punjab Excise Act under which the notification was issued, and the notification were challenged as violating Article 14 of the Constitution. Holding that the expression 'Civilian Club' was vague and for certain other reasons the High Court declared the notification to be void under Article 14. The petition was decided within a few months. A suit could not possibly have given relief to the club within 6 months.

(5) C.W. No. 278 of 1955.—*Sohan Lal* v. *Punjab State*, dated 12th January, 1956.

Under the Requisitioning and Acquisition of Immovable Property Act before requisitioning any property the competent authority has to issue a notice to the owner to show cause why the property should not be requisitioned. The competent authority had issued a notice but it was served not in the manner prescribed in section 15 of the Act. A servant not authorised to receive it had taken it and not communicated it to the owner. The High Court holding that the notice had not been served properly quashed the order of requisition. The case was decided within a few months and the rights of the petitioner upheld without much expense to him. Would an Administrative Court have given effect to this contention or would it have treated this as mere technicality? And which view subserves justice better?

(6) C.W. No. 370 of 1955.—*Girdhari Dass* v. *D. C. Ferozepore*, dated 2nd May, 1956.

Under the Punjab Village Common Lands (Regulation) Act, 1953, the Deputy Commissioner had passed an order vesting certain lands treating them to be Shamilat deh in the Panchayat. He had held no inquiry but on the basis of the revenue records and the report of the Patwari, he had held the land to be Shamilat deh and so covered by the Act. If the land was Shamilat deh his order was proper, if not, the petitioner was being deprived of his property without any justification. The petitioner filed in the High Court with his affidavit documents which showed, at least *prima facie*, that the order was incorrect. The affidavit in reply on behalf of the State did not meet the inference arising from the documents. The High Court quashed the order leaving it to the Deputy Commissioner to hold further enquiry if necessary. Should the High Court interfere in such cases or leave it to the petitioner to bring a suit or appeal to the higher Revenue Authorities? If the Judge is convinced that the order is erroneous should he hold his hand and direct the petitioner to try his other remedies? This question keeps cropping up, and no satisfactory principle has been evolved.

(7) C.W. No. 23 of 1955.—*Ranveer Singh* v. *State*, dated 23th November, 1956.

This case shows the extraordinary lapses which some executive officers are capable of. An enquiry officer while conducting an enquiry on charges, which ultimately led to the dismissal of the petitioner, a Government servant, adopted a most extraordinary procedure. Instead of recording evidence and giving an opportunity to the petitioner of cross-examining the witnesses produced against him the inquiry took the shape of an informal discussion among the 2 witnesses, the petitioner and the enquiry officer. No notes were even kept of this discussion. The proceedings consisted solely of some questions and answered by the petitioner. The justification offered for this procedure was that the main evidence consisted of accounts and documents and the enquiry officer was quite competent to look into them and decide and where he felt any doubt he had asked the petitioner to explain. The High Court naturally refused to treat it as reasonable opportunity, but I wonder what an Administrative Court would have to say about it. If the Administrative Court consisted of officers with executive training it would probably treat it as a mere technicality.

(8) C.W. No. 167 of 1955.—*Bhagat Ram Soni* v. *Union of India*.

The case involved an interpretation of a notification issued under the Displaced Persons (Claims) Act, 1950. The notification defined property in respect of which a displaced person could make a claim but the Proviso provided that where a claimant has been allotted any agricultural land in India and that

(*a*) where the agricultural land so allotted exceeds four acres, the value of the building in respect of which the claim is made shall not, according to the present estimated cost of construction, be less than Rs. 20,000.

(*b*) where the agricultural land so allotted does not exceed four acres, the value of the building in respect of which the claim is made shall not, according to the present estimated cost of construction, be less than Rs. 10,000.

Explanation I.—In this rules, the expression "building" includes :

(*a*) any structure in the immediate vicinity of a building without which the building cannot be conveniently occupied or enjoyed ;

(*b*) any garden, ground, enclosure and out-houses, appurtenant to such building ."

The single Judge decided in favour of the petitioner holding that the expression 'the building' referred to a number of buildings but he was reversed on appeal. This was eminently a question of interpretation suitable for decision by a High Court.

(9) C.W. No. 385 of 1955.—*Suraj Parkash Kapur* v. *The State.* (1957 P.L.R. 103).

During the allotment of evacuee land in the Punjab various persons had secured very good lands while others with equal rights had received poor lands. The latter complained against this injustice to the Rehabilitation Department, which gave an undertaking that during proceedings under the Holdings (Consolidation and Prevention of Fragmentation Act), this injustice would be removed. In November, 1951, the Government decided to carry out the undertaking. It issued executive instructions in 1952 (these instructions were withdrawn in 1956) to the Consolidation Officers to remove the injustice. These executive instructions were challenged and scores of petitions were filed. Stay orders were obtained and consolidation proceedings, wherever they were taking place, came to a stop. The High Court held that the Executive instructions were contrary to the provisions of the Consolidation of Holdings Act, the Administration of Evacuee Property Act, 1950 and violated Article 31 of the Constitution as they deprived certain displaced persons of property without authority of law. The latter part of the decision was overruled in another case by the Supreme Court (*Amar Singh* v. *Custodian, Evacuee Property, Punjab*[1].) The Government felt that if the Judgment of the High Court was allowed to stand the State would have to spend a sum of about 2 crores in order to do the work of consolidating holdings again and that in the process rural economy would be disrupted. The Punjab Legislature intervened and with the assent of the President passed a Validating Act (VI of 1957). This Act was challenged as being *ultra vires* and the High Court has heard arguments on this question. In the meantime the work of consolidation in villages in which these executive instructions were applied and they are hundred is at a stand-still. The State is determined to legalise whatever has been done and it is only a question of time before this objective is finally achieved. But in the meantime most of consolidation of holding in the affected village is being held up. What is the solution of the difficulty illustrated by this case ? If the amendment which I have suggested had been part of Article 226 there would have been no interference with this activity, which is essential for the success of the grow-more food campaign.

(10) C.W. No. 222 of 1955.—*Uppal* v. *Chief Settlement Commissioner*, dated 27th September, 1956.

The petitioner attacked the order of the Settlement Commissioner dated May 19, 1955, valuing the petitioner's land left in Pakistan, under the Displaced Persons Claims (Supplementary) Act, 1954. One of the Settlement Commissioners had in the presence of the petitioner dictated an order earlier on May 29, 1954, in favour of the petitioner, but had not signed it and the petitioner alleged that this order was final and could not be reopened. Further the Settlement Commissioner in the later order had relied on material contained in proceedings concerning other persons without putting this material to the petitioner. What was the effect of this omission ? The answer to this was assumed to depend on whether the proceeding was quasi-judicial or not. The High Court found that the proceeding was quasi-judicial and the failure to put the material to the petitioner amounted to a denial of hearing. There are interesting cases in U.S.A. on this point (*See* Gellhorn & Byse: Administrative Law, page 940, *et seq.*) Once the American cases on Adminis-

1. (1957) S.C.J. 574 : A.I.R. 1957 S.C. 299.

trative Law become common knowledge among the legal profession our jurisprudence would get richer. But if these cases are studied it becomes clear that the Courts are capable of chalking out a middle line which neither fetters the administrative agencies nor sacrifices fairplay. An administrative Court, I fear, would not attach so much importance to fairplay.

(11) C.W. No. 257 of 1955.—*Arjan Singh* v. *Excise and Taxation Commissioner*.

The Excise and Taxation Commissioner passed an order cancelling the registration certificate of the petitioner issued under the Punjab Sales Tax Act. The petitioner filed a revision to the Financial Commissioner alleging that he had not been given any notice before cancellation. The Financial Commissioner dismissed the revision on the ground that the petitioner had not produced certified copies of previous orders. The petitioner then approached the High Court under Article 226 of the Constitution. The High Court held; "that it is a principle of natural justice that no order to the detriment of a subject should be passed before he has been heard. Cancellation reacts grossly to the disadvantage of the dealer because he cannot carry on his business after the cancellation." Section 7 of the Act which enabled the Excise and Taxation Commissioner to cancel the license did not make any mention of any opportunity being afforded before cancellation.

This type of question keeps arising and the High Court keeps on interfering on this point, but the Executive Officers seem to be disinclined to give opportunity unless the Act specifically so provides. It seems desirable that all Acts or Rules made under the Acts should provide a procedure consonant with the principles of natural justice.

(12) C.W. No. 355 of 1955.—*Sugar Syndicate* v. *Excise and Taxation Commissioner*.

The Sales Tax Department was refusing to refund sales-tax although it admitted that the sales-tax had been levied and collected by it wrongly. The petitioner applied for a writ of *mandamus* to compel the department to refund the money. The petitioner had no other remedy because section 19 of the Act prevented the filing of a suit. Section 12 of the Act, however, enabled the assessing authority to refund taxes. The only defence was that the petitioner had collected the sales-tax from its customers. The High Court held that this was no defence and issued a direction directing refund. It will be seen that apart from Article 226 of the Act the petitioner would have had no other remedy.

(13) C. W. No. 14 of 1955.—*Ram Sarup* v. *State of Punjab*.

A mate coolie attached to the Public Works Department was removed from service on the basis of inquiries made at the spot of the alleged occurrence by various officers including the Superintending Engineer. In these inquiries the petitioner had not taken any part. The High Court holding that no reasonable opportunity had been given quashed the order of removal. This case also illustrates the difference of the Executive Officers to give opportunity to the affected parties.

(14) C. W. No. 14 of 1955.—*Mehar Singh Rikhi* v. *Shri R. K. Vaish*.

The Settlement Commissioner had rejected a Review Application on the ground that no review application lay. The High Court found that a review application did lie, and accordingly directed the respondent to hear the review application and dispose of it according to law. In this case too the petitioner had no other remedy except to approach the High Court under Article 226 of the Constitution.

In the High Court in the year 1955 about 1000 (one thousand) applications under Article 226 were filed. A great number were dismissed at the preliminary hearings and of the rest only the above discussed cases succeeded. Does this record justify any apprehension in the mind of the State that it will not get justice in the High Court ?

CONTROL OF THE LEGISLATIVE POWERS OF ADMINISTRATION*

By

N. C. CHATTERJEE, *Barrister-at-Law, Senior Advocate, Supreme Court of India.*

In the British House of Commons a historic debate took place on the motion of a private Member that " the power of the Crown had increased, is increasing and ought to be diminished ". It is often remarked that a similar motion should be tabled in the House of the People in the Indian Parliament to the effect that the power of the Executive has increased, is increasing and ought to be diminished. Those who have been brought up under the influence of the *laissez-faire* doctrine and under the spell of Professor Dicey's classic exposition of the doctrine of Rule of Law, resent the inroads of New Despotism in the legislative field which is making Parliamentary sovereignty to some extent illusory.

The expansion of Governmental control and regulation and the progressive demands which are made upon a modern State for the uplift of the masses in an under-developed economy would lead to the gradual expansion of delegated legislation. It is almost futile to say that there is no Administrative Law either in England or in India. Administrative Law should no longer be *terra incognita* to the citizen or to the lawyer in India. According to a recent statement made by the Union Minister of Law there are as many as 100 administrative tribunals operating under Central Acts. The profound change in the role of administration has caused a set back to the cause of freedom of the individual as understood in the 19th Century. The recent Companies Act has clothed the Executive with judicial or quasi-judicial powers or functions in a number of important matters.

It has been aptly said that " the very success of *laissez-faire* has led to its undoing." The progress of industrialisation has led to the concentration of population in insanitary and overcrowded cities. The administration is under a duty to intervene in the interest of public safety and health and a Government is likely to be censured if it fails to effectively discharge its obligations. That implies interference with citizens' rights and is often not consistent with freedom of property and personal liberty. Similarly an irresistible urge for fair treatment of exploited labour has led to the encroachment on the right of capital or management to the untrammelled right of employment based on the old concept of freedom of contract.

Administrative Law poses the most difficult problem of modern times, namely, the conflict between Governmental authority and individual freedom and the problem is how to bring about a balance between the two. Those who have faith in the Rule of Law do not want any change in the basic doctrine of the absolute supremacy or predominance of regular law over arbitrary power. Modern constitutional lawyers may comment on Dicey's traditional exposition of the Rule of Law as the homily of a Victorian Whig.

Yet the most fervent champion of Administrative Law should recognise that a democratic State should be based and run on one principle that a man must be punished for a breach of law and he can be punished for nothing else. Equally important is the doctrine of subjection of the executive to the Courts of the country which are impartial and free from official control or pressure. It may be that Dicey misunderstood or it will be an evil day for a State which believes in parliamentary Government, if it fails to emphasize the basic doctrine of equality before the law which means that Fundamental Rights must be protected by all the organs of the State, that Police Law is not law and that freedom requires an efficient legal system which inspires public confidence and protects essential liberties. In a democratic State functioning under a written Constitution it is impossible to expect that the Constitution would be the result of the ordinary

* Thesis read at the Administrative Law Seminar, Delhi on 15th December, 1957.

law of the land. The Fundamental Rights have been consciously placed on a high pedestal by the makers of the Indian Constitution. The Supreme Court repelled the contention urged by the State Counsel and held that under the Constitution of India the highest Court is constituted the protector and guarantor of Fundamental Rights and consistently with the responsibility laid upon it, the Court cannot refuse to entertain an application seeking protection against infringement of Fundamental Rights and such applications can be made direct to the Supreme Court without reference to the High Court which has concurrent jurisdiction in the matter. This great principle which was laid down by the Supreme Court of India in the very first year of its existence in the *Cross-Roads Case*[1] has been emphasised and has not been in any way affected by the later decisions of that Court.

We should make an objective approach to the entire problem. With the expansion of national economy there is a demand for greater control and stricter regimentation and that will lead to the conferment of greater powers upon the executive. Many years back Chief Justice Hughes of the Supreme Court of the United States of America observed that the Congress could not delegate legislative power to the President and pointed out that the principle was vital to the integrity and maintenance of the system of Government ordained by the American Constitution. (*Wichita* v. *Public Utilities Committee of Kansas.*[2]) In the *Panama Sugar Refining Case*[3], the Supreme Court struck down the N.I.R.A. on the ground of unconstitutional delegation of legislative power, but it made pertinent observations :

"The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicability which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorisations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility".

Lord Hewart's scathing exposure of the New Despotism led to a searching enquiry by a high-powered Committee in England which pronounced the verdict that delegated legislation was necessary and inevitable.

From my experience as the Chairman of the Parliamentary Committee on Subordinate Legislation for some time. I can say that having regard to the quantity of legislative output and the limited time available to Parliament and the impracticability of anticipating difficulties in the actual working of a complicated measure delegated Legislation is bound to increase in order to meet the expanding needs of a progressive welfare State. The old concept that the State existed for the maintenance of law and order has been exploded. If India's Second Five Year Plan is to succeed, there is bound to be more direct and indirect control over the economic life of the nation and the resources of the State. Both national planning and provision for social services will necessitate the making of detailed regulations and the imposition of various restrictions. From our experience we can say that the focus of enquiry should shift from the question of desirability of delegation to that of control and the problem is really one of safeguards. It is impossible for the Parliament even if the Leader of the House is anxious to accommodate the Members to find the time to enable them to devote proper attention to the making of detailed regulations which the modern State demands, and the legislators often suffer from the handicap of not being properly instructed in many technical fields where a modern Parliament has to legislate. The difficult question how to secure adaptability or flexibility and at the same time to ensure compliance with the will of the nation

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1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 2. 260 U.S. 48.
o : (1950) S.C.R. 594. 3. 293 U.S. 388.

is reflected in the Legislature. Protagonists of Administrative Law should remember the admonition administered by Mr. Justice Cardozo of the Supreme Court of America in the *Schechter Case*[1] that the delegated power of legislation should not run riot. It should be canalised within banks that keep it from overflowing. It must not be "unconfined and vagrant". (*Schechter Case*[1].) The Cardozo doctrine was accepted as laying down the correct law by the Supreme Court of India in the *Delhi Laws Act Case*[2]. But the question is how to secure compliance with the doctrine laid down in that case. The majority Judges in that case rejected the extreme contention put forward by the Attorney-General that an unlimited right of delegation is inherent in the legislative power itself. The majority held that this view was not warranted by the provisions of the Indian Constitution. The Legislature must legislate. It must retain in its own hands the essential legislative functions and the legitimacy of delegation depends entirely on its being used as an ancillary measure. It is easy to lay down the doctrine but it is very difficult to secure its compliance. The question is what steps should be taken to find that the Parliament and the State Legislature are discharging their essential legislative functions and that they are declaring their legislative policies and laying down standards which are formulated into precise binding rules of law. The line of demarcation is rather thin and the Law Institute would render a great service if it can devise effective safeguards to prevent the abdication of the essential legislative functions on the part of the Parliament or State Legislatures in India as well as Executive enroachments on law-making by disguised trespasses.

Special attention should be drawn to some of the later Judgments of the Supreme Court where the salutary principle adumbrated by Justice Cordozo and recognised in the *Delhi Laws Act Case*[2] has been somewhat whittled down. Uncanalised delegation should not be permitted by mere formulation of so-called legislative policy in vague terms in a statute. The Legislature and the lawyer both require guidance on this subject.

The Committee on Subordinate Legislation in the Indian House of the People was nominated by the Speaker in December, 1953. That Committee made certain recommendations in their First Report which are set out :—

(*i*) Bills containing proposals for delegation of legislative powers should invariably be accompanied by a memorandum containing the details and scope of such proposals.

(*ii*) Uniformity should be secured in the provisions delegating legislative powers in the various Acts.

The Speaker of the Indian Parliament appointed one of the Opposition Members as Chairman on this Committee and that is in conformity with the British practice which is a desirable one. It will be a great comfort for the citizens of India to know that the Speaker of the House of People took special care that Parliament should have effective control whereby it could ensure that powers were being properly exercised by the executive. Although delegation of legislative powers to some extent was inevitable having regard to the pressure on Parliamentary time and the technical nature of the subject-matter of modern legislation and the demand for flexibility and utilisation of experience in working out complex schemes of reform, certain suitable safeguards are still requisite :

(*a*) While delegating the powers to Executive the Parliament should use clear and consistent terminology.

(*b*) Subordinate law-making authority should not be given power to amend the Statute in any manner which has been passed by the Legislature.

(*c*) The Legislature should be careful to preserve the jurisdiction of the Courts of Law and access of the citizens to the Courts should not be forbidden except in very exceptional cases.

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1. 295 U.S. 495.

2. (1951) S.C.J. 527 : 1951 S.C.R. 747.

In a Memorandum prepared by the Speaker of the House of the People in the year 1950 which was forwarded to the then Law Minister certain pertinent observations were made :—

" At the present time Parliamentary control over delegated legislation is defective in two respects :—

(a) Legislative powers are freely delegated by Parliament without the members of the two Houses fully realising what is being done.

(b) Although many of the regulations made in pursuance of those powers are required to be laid down before both the Houses and in fact they are so laid, there is no automatic machinery for the effective scrutiny on behalf of the Parliament as a whole and quantity and complexity are such that it is no longer possible to rely for such scrutiny on the vigilance of private Members acting as individuals ".

To some extent the constitution of the Committee on Delegated Legislation has been useful in remedying the defects. But from our experience we should emphasize the need for greater Parliamentary control and vigilance over delegated legislation, and we should admit that adequate procedure to be followed by the administrative process in the formulation of statutory rules and regulation has not yet been developed. Legislative prescription of procedural requirement is often resented by the Departments concerned. The basic problem, as has been pointed out by Dr. Schwartz in his admirable treatise on American Administrative Law, is the democratization of the rule-making process without imposing such burdensome restrictions that Rules will either not be made, or policy will be driven underground.

A number of statutory orders had been laid on the Table of the House of the People after considerable delay. In some cases the delay was for five months and in some cases it was six months or more.

Competent authorities on Administrative Law like Professors Griffiths and Street have pointed out the difference between *procedural ultra vires* and *substantive ultra vires*. In some cases it will be desirable to ensure that the administration is required by statute to consult particular bodies or associations before making Subordinate Legislation. Democrary means Government by consent. It depends not merely on discussion in Parliament but on direct and indirect consultation with the representatives of interested groups or bodies likely to be affected. In some of the British statutes the Minister is required to consult certain specified interests before making statutory orders or instruments. The power to draft an instrument may be delegated to the group or association concerned and the Minister may become a confirming or approving authority. In some recent British Statutes, regulations are to be submitted to a statutory body by the Minister and the report of that body is to be laid before the Parliament. Any one with experience of the working of a democratic Legislature knows that it is of very little practical ultility to direct that when an Act delegates power to the executive, the Subordinate Legislation should be laid before the Parliament. In such cases Subordinate Legislation is valid when it is made and the Members are not authorised to move for the annulment of Subordinate Legislation nor is the Government required to bring the Resolution of the House before it becomes operative. I would commend for the consideration of both the Parliament and of the Law Institute the suggestion that it would be more effective to direct that Subordinate Legislation should be laid before Parliament and must be made subject to an affirmative resolution by each House of Parliament. Some departments may resent such safeguards in special cases and then there may be provision that the Subordinate Legislation should be laid in draft before the House and made subject to annulment within a specified period.

The time has come when lawyers and Judges should reconsider the validity of the traditional rule of construction which forbids them to refer to Parliamentary debates or Statements of Objects and Reasons or Reports of Commission. Lord Justice Denning pointed out the difficulties that Judges have to face when they are

set to work "on the constructive task of finding the intention of Parliament". A Judge must do this not only from the language of the statute but also from a consideration of the social conditions which give rise to it and of the mischief which it is meant to remedy. There is good deal of force in the weighty observation of the learned Judge when he says that "the Court must supplement the written word so as to give 'force and life' to the intention of the Legislature": *Seaford Court Estates Ltd.* v. *Asher.*[1]

In one case the Supreme Court of India held that speeches made by Members of the House of Parliament on the floor of the House are not admissible as extrinsic aids to the interpretation of statutory provisions: (*Aswini Kumar Ghosh* v. *Arabinda Bose*)[2]. Sastri C.J., and three other learned Judges held that the statement of objects and reasons annexed to a Bill, the form of the original Bill and the fact that certain words and phrases were added to or omitted from the original Bill are also not admissible as aids to the construction of statute. In another case, the Supreme Court referred to the statement of objects and reasons for ascertaining the conditions prevailing at the time it actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy: *The State of West Bengal* v. *Subodh Gopal Bose.*[3] In a recent case, Das, C.J., quoted with approval the dictum of Lord Halsbury "that it was not only legitimate but highly convenient to refer both to the former Act and to the asserted evils to which the former Act had given rise, and to the latter Act which provided the remedy": *Bengal Immunity Co.* v. *State of Bihar.*[4]

In England Judges have on some occasions set aside Subordinate Legislation on the ground of repugnancy to the fundamental liberties of citizens. In *Chester* v. *Bateson*[5], the learned Judges declined to construe a Regulation so as to avoid violation of the provisions of Magna Charta and the Bill of Rights and the Fundamental liberties of the British subjects to have access to the Courts. Fortunately under the Indian Constitution it is a constitutional obligation of the Court to strike down statutes which infringe the Fundamental Rights. The greatest difficulty of judicial control over Subordinate Legislation is the conservative view which was adopted by some Judges following *Lockwood's case*[6]: There the House of Lords held that a provision that an order made shall have effect "as if enacted by the Act" was practically immune from judicial review, and as long as the Act remained in force, it was not competent to question its validity or the order.

Lockwood's case[6] was explained in later cases and it has been held that an Act which provides that an order made by the Minister shall have effect as if enacted in the Act does not preclude the Court from calling in question the order of the Minister when the scheme of the order made by him is not consistent with the provisions of the Act: (*Minister of Health* v. *The King* (*Yaffe*)[7]).

The greatest difficulty is created by sub-delegation, and the Indian Law Institute would render a signal public service if it can prescribe certain limits by which a Minister to whom authority is delegated by Parliament or Legislature is permitted to sub-delegate his authority to his officials.

Judicial control over the exercise of legislative powers by the executive is restricted because it can only be effective when the subordinate legislation is *ultra vires* or *mala fide*. Necessity for the order or the adequacy of evidence before the Minister or officer is ordinarily outside judicial purview. It is often urged that the English Courts had taken a very narrow view and comments had been made on Lord Green's judgment in the *Ayr Collieries Case*[8]. The Supreme Court of India has not taken such a restricted view, and it has held that the grounds on which the executive acts must have rational relation to the objects of the statute; otherwise the orders

1. L.R. (1948) 2 K.B. 481.
2. (1953) S.C.R. 1 : 1952 S.C.J. 568.
3. (1954) S.C.J. 127 : (1954) S.C.R. 587.
4. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : (1955) 2 S.C.R. 603.
5. L.R. (1920) 1 K.B. 829.
6. L.R. (1894) A.C. 347.
7. L.R. (1931) A.C. 494.
8. L.R. (1943) 2 All E.R. 546.

even in preventive detention cases would be illegal : (*Atma Ram's case*[1] and *Pepsu Case*[2]). The Australian High Court has struck down as *ultra vires* Regulations made by the executive under the authority of the Commonwealth Statutes if the same went beyond the powers of the Commonwealth: (*Victorian Chamber* v. *Commonwealth*)[3].

The great impediment to judicial control is the tendency to vest in the Minister subjective discretion to act by the use of expression "if the Minister is satisfied". In *Nakudda Ali's case*[4], Lord Radcliffe observed : "If the question whether the condition had been satisfied is to be conclusively decided by the man who wields the power, the value of the intended restraint is in fact nothing". Lord Radcliffe's dictum was quoted with approval by Mukherjee, J., in *Advani's case*[5]. The other impediment is the attempt to oust the invocation of the rule of *audi alteram partem* on the plea that the Minister is not under a duty to act judicially. *Franklin's case*[6] in England has been subjected to strong criticism. When the order made by a Minister affects citizen's right to property, it is desirable that the Minister should be under a duty to act judicially at some stage so that the principles of natural justice may be invoked in suitable cases.

In cases where the delegated legislative power is to be exercised on the mere subjective satisfaction of a Minister or Officer, the scope for justiciability of the Rules or Orders should not be restricted. Even in such cases, the Rules or Orders made on the subjective satisfaction of a Minister or designated official should be open to review, if they are not consistent with the policy of the parent Act, and reference should be permitted to the standards which should be formulated in the Act and also to the Statement of Objects and Reasons placed before the Legislature when the Bill was sponsored.

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1. (1951) S.C.J. 208 : (1951) 1 M.L.J. 389: 1951 S.C.R. 167.
2. (1954) S.C.R. 276.
3. 67 C.L.T. 413.
4. L.R. (1951) A.C. 66.
5. 1950 S.C.J. 451 : (1950) 2 M.L.J. 703 : 1950 S.C.R. 621.
6. L.R. (1948) A.C. 87.

RESPONSIBILITY OF THE MINISTER IN PUBLIC ADMINISTRATION : A COMPARATIVE STUDY*

By

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The Minister in England is subject to Parliamentary control. Rules of Parliamentary procedure provide that the Minister may be questioned about the actions of those who are under his administrative control. Bias on the part of the subordinates in the administration can be questioned in Parliament. No Parliamentary debate can be held on the conduct of Judges. Free Parliamentary criticism can be had on the general field of administration and it is the responsibility of the Minister to meet such criticism.

The House of Commons controls policy of the Administration by the address in reply to the King's speech, the supply debates, adjournment motions, and question time. The House of Commons does not formulate policy but only criticises it. In actual control of finance, the control is limited to the debates on the Budget resolutions and the Finance Bill. The Estimates Committee and Public Accounts Committee try only to guide but cannot actually control expenditure. Every day close scrutiny over expenditure would make Government impossible. What happens in fact is, that Government explains and defends its policy, acts on their policy and is questioned, criticised and defended on its action. This is the only way in which Government can be effective.

JUDICIAL REVIEW.

The Minister's acts are generally subject to judicial review, excepting those exempted specially by legislative provision, which has become the present-day habit in regard to welfare and crisis legislation, but even in such cases, Courts have held they are subject to judicial review in certain cases. Administrative acts and orders of the administrative Tribunals will be declared illegal and *ultra vires* by the Courts if there is no jurisdiction to carry them out. Acting in excess of jurisdiction or for want of it can be both subject to judicial review. The review used to be effected by the writ of *certiorari* and the writ of error. The High Court in its supervisory jurisdiction subjects them to reivew. The Courts will review any acts or orders passed by tribunals done in bad faith. Non-compliance with procedural requirements will subject them to review. Judicial review is available for acts or orders passed in breach of natural justice. Error in law apparent on face of record is also subject to review by *certiorari*. The Courts have claimed the right to interfere with the exercise of an administrative discretion if the administrative Tribunal acts against the principles of natural justice and is arbitrary, vague and fanciful. If powers are used for improper purpose or if they are used without taking into account all relevant considerations, judicial review is allowed.

The leading case for review on the ground of improper purpose is *Leeds Corporation* v. *Ryder*[1], where Lord Loreburn said, that administrative Tribunals must endeavour to carry out the spirit and purpose of the statute. Ministers, who wanted to avoid judicial control have frequently vested in them subjective discretionary power, by using the words in the enactment "if the Minister is satisfied" : see *Liversidge* v. *Anderson*[2] and *Carlton Limited* v. *Commissioners of Works*[3]. The Courts in those cases held, that though such expressions may prevent the Courts from deciding whether the Minister has reasonable ground for his belief, or from reviewing his acts because he took into account the wrong considerations, yet opined that they would quash if the powers were not exercised in good faith.

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1. L.R. (1907) A.C. 420.
2. L.R. (1942) A.C. 206.
3. (1943) 2 All E.R. 560.

Lord Sumner in *Robert* v. *Hopwood*[1], has laid down that the defence that the Minister's acts or conclusions of the Tribunals are *bona fide*, will be of no avail if the discretion is used beyond their powers. In the leading case of *Westminster Corporation* v. *L. N. W. Ry.*,[2] it was held that bad faith must be specifically proved. This enables the administration to throw the burden of proof on the plaintiff. The purpose of the administrative body is a question of fact and very difficult to prove. If the result contemplated by the administration is legal, the Courts will not quash the acts or orders merely because one of the motives which activated them is extraneous to the issue.

Ignorance of material considerations or the importing of extraneous considerations will nullify the acts of administration. (*Robert* v. *Hopwood*[1].) The Courts are thereby ensuring only that the discretion is properly exercised, that is according to law. But erroneous interpretation of the statute is not an excess of jurisdiction (*R.* v. *Minister of Health*[3]). In *Robert* v. *Hopwood*[1], the House of Lords held that the enumeration of the words "if it thinks fit" cannot entail the local authority to be guided by eccentric principles of the socialistic philanthropy so as to enable them to pay such wages as they think fit, and such act is *ultra vires*. "Unreasonable" acts are also subject to judicial review. Any decision not genuinely arrived at by a Tribunal must come under that category.

The attempt to cut down the appellate powers of the Court by legislation, has not been successful as the Courts have held that the provision "the decision shall be final and not subject to appeal to any Court" does not exclude judicial review. (*R.* v. *Minister of Transport*: Ex-parte *H. C. Motor Works, Limited*[4]).

Canadian Courts have forcibly declared many attempts to exclude judicial review, as unconstitutional. In such cases, Courts have held that the acts must be strictly within jurisdiction. (*R. E. X. X. Rel. Davies* v. *Macdougall Construction Co., Ltd.*[5]). The Privy Council in *Colonial Bank of Australia* v. *Williams*[6], has laid down that the Courts can still quash on the ground of a manifest defect of jurisdiction in the Tribunal that made it, or manifest fraud in the party procuring it.

The methods of review are by writs of *certiorari*, prohibition, *mandamus*, Declaratory Judgments, Injunctions, *Habeas Corpus*, Actions for Damages, etc. I am not going into the details of the methods of judicial review as it is not my province in this thesis.

The writ of *certiorari* is issued in India under the wide powers given under Articles 32 and 226 of the Indian Constitution and English Law is applied liberally. *Basappa* v. *Nagappa*[7].

With tremendous increase in the administrative functions of the Minister and the creation of a number of administrative bodies and Tribunals, the usual rule that the King can do no wrong, *i.e.*, by clothing the sovereign with immunity for his acts, had to be modified, and two decisions of the House of Lords restrained the immunity of the Crown on the ground of the Royal privileges. (*Mersey Docks and Harbour Board Trustees* v. *Cameron*[8].) The Crown Proceedings Act subjects the Crown, with serious reservation to private law.

Administrative authorities are subject to be sued for torts of their servants in the course of their employment. Actions for non-performance of statutory duties, misfeasance and non-feasance are also entertainable.

SCOPE OF JUDICIAL CONTROL.

Sir Cecil Carr in his book on 'Concerning Administrative Law' at page 108 is of opinion that "The administrative Tribunal would find the facts, and the Courts would not interfere unless the absence of evidence or the perversity of the finding required them to intervene".

1. L.R. (1925) A.C. 578.
2. L.R. (1905) A.C. 426.
3. L.R.(1939) 1 K.B. 232.
4. (1927) 2 K.B. 401.
5. (1930) 1 D.L.R. 629.
6. (1874) L.R. 5 P.C. 470.
7. (1955) 1 S.C.R. 250: 1954 S.C.J. 695.
8. (1864) H.L.C. 443 : (1866) L.R. 1 H.L. 93.

This suggested division of labour is not fully carried out, however, for constitutional principles require some judicial review upon facts, as well, as Anglo-Saxon Jurisprudence is based on the Rule of Law or supremacy of the law. In essence, the question whether the administrative finding of fact rests on substantial evidence is really a question of law, for a finding not so supported, is arbitrary, and unauthorised.

As regards jurisdictional facts, Courts have the power to take additional evidence to decide whether such facts exist, as laid down in *Weite and Collins* v. *Minister of Health*[1]. The Courts are given the power to review the evidence tendered by Administrative Pension Appeal Tribunals[2] by which the statement of the Minister that a particular evidence is conclusive, is taken for granted. If the evidence as tendered is arbitrary, the Courts can refuse to accept it, and declare the tribunals' findings of fact as unfounded, and *ultra vires*, as it is an abuse of jurisdiction.

American Courts have satisfied themselves that if there is substantial evidence to support the findings of fact of administrative tribunals, there is no objection to Courts of law proceeding on the basis of their findings. The Courts have only to see if the finding is supported by evidence, and is not concerned with the weight of the evidence. (Observation of Justice Hughes in *St. Joseph Stock Yard Co.* v. *United States*[3].)

The Supreme Court of America has held in *Humphreys* v. *United States*[4], that Article 3 of the Constitution debars Constitutional Courts from reviewing issues of facts, even in controversies of a judicial nature, as such issue were heard and determined in the first instance by an administrative agency. The judgment is based on the ground that administrative judgment or executive judgments are outside judicial review by the doctrine of the separation of powers, unless they involve question of law (refer to the following cases), *Southern Pacific* v. *Darnall Lumber Co.*,[5] *Grand Northern Railways Co.*, v. *Merchants Elevator Co.*,[6] *Baer Bros. Mercantile Co.* v. *Danier and Rio Grande Ry. Co.*[7], *United States* v. *Burleson*[8] *United States* v. *Durell*[9].

The committee on Minister's powers in England had this distinction in mind, and limited its recommendations of appeals from executive decisions to points of law and went so far as to say that there should be as a rule no appeal to any Court of law on issues of facts, and this goes beyond the American principle of limiting reviews to cases governed by the substantial evidence rule.

But the distinction between law and fact, is not always clear, and some authors say, that when Courts are inclined to review, they say it is a question of law, and when they are disinclined to review, they classify it as a question of fact.

In *Dobson* v. *Commissioner*[10], the substantial evidence rule was said to be applicable to tax cases. Sometimes, facts are classified as mixed questions of law and fact.

The jurisdiction of the reviewing Courts is limited to questions of law. It does not extend to question of fact but it is left to the discretion of the reviewing Courts to ultimately decide whether one particular issue relates to fact or law.

Administrative findings of fact, whether they are without evidentiary support, is a question of law. As laid down by Swift, J., In re, *Bowman*[11], the Court cannot interfere with the administrative fact findings, provided only, that there was some evidence to support them. *See also* In re, *Beanbridge*[12].

In this sense, English Courts give greater weight to administrative facts than American Courts, for there is no necessity to apply the substantial evidence rule in England. In England, proof of 'no evidence' alone will invalidate the findings. Even if there is some evidence it will do to support the administrative fact. Ameri-

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1. L.R. (1949) 2 K.B. 838.
2. L.R. (1945) K.B. 490.
3. (1936) 298 U.S. 38.
4. (1935) 295 U.S. 602.
5. (1918) 245 U.S. 531.
6. (1922) 259 U.S. 255.
7. (1914) 233 U.S. 479.
8. (1921) 255 U.S. 407.
9. (1899) 172 U.S. 576.
10. 320 U.S. 489.
11. L.R. (1932) 2 K.B. 621.
12. L.R. (1939) 1 K.B. 300.

can Courts have always required substantial evidence to support the findings of fact (*Consolidated Edison Co.* v. *National Labour Relations Board*[1]).

Questions of law are the province of Courts of law and both in England and in America, the administrative tribunal has no final word in deciding questions of law.

Mixed questions of law and fact have been pointed out in England as being questions which cannot be given always the finality of questions of fact, and English Courts have interpreted each question on its own merits.

Closely related to this question is the decision on jurisdictional facts, whether a tribunal has the power to decide the nature of its own jurisdiction if the facts on which its jurisdiction rests are questioned. In such cases, Courts must have the power to determine whether the condition for the exercise of the tribunal's jurisdiction were satisfied or not.

In cases of constitutional facts, that is, in cases where the interpretation of certain facts will lead to a constitutional right, the determination of the administration as to the interpretation cannot be final, and therefore judicial review will lie in such cases as decided by *Ohio Valley Water Co.* v. *Berwon Borough*[2] and *St. Joseph Stockyard Co.* v. *United States*[3].

Scope of review on the ground of discretion of the Minister, whether it is subjective or objective, has given room for litigation in England. Ministers who want to avoid judicial control, have frequently vested in them subjective discretionary power, by using the words in their enactment 'If the Minister is satisfied' (*Liversidge* v. *Anderson*[4] and *Carlton Ltd.* v. *Commissioners of Works*[5]). The Courts in those cases held, that though such expressions may prevent the Courts from deciding whether the Minister has reasonable ground for his belief, or from reviewing his acts because he took into account the wrong considerations, yet opined that they would quash if the powers were not exercised in good faith.

Courts of law have sometimes refused to view the orders of the tribunal as judicial, but styled them as purely administrative, and thus refused to interfere. In the famous Stevenage case (*Franklin and others* v. *Minister of Town and Country Planning*[6],) it was laid down that the Minister, being an agent of Parliament, can decide upon the construction of towns in a particular area and as his act is not a quasi judicial act subject to judicial review, it was purely administrative.

The decline of judicial review was further seen in the case of *Robinson and others* v. *Minister of Town and Country Planning*[7], where, on appeal, it was held that the words "requisite" and "unsatisfactorily" indicated that the making of the order was a matter of opinion and policy of which the Minister was sole judge, that no objective test was possible, that he was acting purely in executive capacity and not quasi-judicially. (*See* Lord Green, M.R.'s judgment).

So far as Indian Courts are concerned, judicial review is governed by Articles 32, 136 and 226, of the Indian Constitution and as regards Article 226, reference may be made to the judgment of the Supreme Court of India in *Raj Krishna Bose* v. *Binod Kanongo*[8], which held that the powers conferred on the High Court and Supreme Court by Article 226 of the Constitution could not be taken away or whittled down by the legislature. The discretion of the Supreme Court and High Court is unimpaired.

Article 32 of the Indian Constitution cannot be invoked in a case where the conclusions of fact have been made by the relevant authorities, and issues of licenses for controlling the export and import of soda ash, a material need of the community, the policy of regulating which has been laid down in the preamble of the legislation, cannot be said to be *ultra vires* as being delegated legislation, by the legislature parting with the power to frame its legislative policy. In modern times, legislative

1. 305 U.S. 197, 229.
2. (1920) 253 U.S. 287.
3. (1936) 298 U.S. 38.
4. L.R. (1942) A.C. 206.
5. (1943) 2 All E.R. 560.
6. (1947) 68 T.L.R. 185 (C.A.); 63 T.L.R. 446 (H.L.).
7. (1947) 63 T.L.R. 374.
8. (1954) S.C.J. 286, 289.

policy is largely a product of the age, and such definitions of administrative policy cannot be the ground for attacking a legislation as offending the fundamental right to trade or uncontrolled right to trade. This has been laid down recently by the Supreme Court of India in the case of *Batnagars and Co., Ltd.* v. *The Union of India*[1], following *Harishanker Bagla and another* v. *State of M.P.*[2]. Thus this judgment tends to narrow down the difference between law and policy in administrative law.

In India unlike in England, it has been held that where the legislature has performed its duty of laying down the policy of the enactment it can, not only delegate the function of subordinate legislation, but also authorise the delegates to re-delegate their function provided the sub-delegates are specified by the legislature itself. (*Mulchand* v. *The State*[3]).

Many statutes in India have provided for quasi-judicial powers in administrative bodies like (*a*) Custodian of Evacuee Property under the Administration of Evacuee Property Act, 1950, (*b*) Transport Authorities under the Motor Vehicles Act, (*c*) the Transport Board Authorities, (*d*) The Rent Controller under the State Rent Control Acts. Special tribunals like the Industrial Tribunals and Road Transport Authority have been invested with quasi-judicial powers.

The Indian Constitution makes provision for bringing these under the control of writs—the directions or orders or writs enumerated in Article 32 (2) and (3), Article 226 (1) (*b*)—and brings them under the superintendence of High Courts under Article 227 (1). An appeal is also provided against their orders by special leave (Article 136-C (1)). There is also the right for the litigant to proceed by way of ordinary suit against the authorities.

APPEAL AGAINST ACQUITTAL AND THE DOCTRINE OF COMPELLING REASONS

By

H. G. Panda, *Advocate, Orissa High Court.*

Prior to *Sheo Swarup's case*[4], the view of some Courts was that the High Court had no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court has " obstinately blundered " or has through "incompetence, stupidity or perversity" reached such distorted conclusions as to produce a positive miscarriage of justice. In *Sheo Swarup's case*[4], the Judicial Committee, however, held that the High Court has full power under sections 417, 418 and 423 of the Criminal Procedure Code to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. But in exercising the power conferred by the Code and before reaching its conclusions upon fact the High Court should give weight and consideration to such matters as :—

(1) the views of the trial judge as to the credibility of the witnesses.

(2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial.

(3) the right of the accused to the benefit of any doubt and

(4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Having laid down these principles, the Privy Council dismissed Sheo Swarup's appeal as their Lordships had no reason to think that the High Court had failed to take all proper matters into consideration while reversing the order of acquittal passed by the Session Judge of Cawnpore.

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1. (1957) S.C.J. 546.
2. (1954) S.C.J. 637.
3. (1952) 56 C.W.N. 789 ; C.R.P. No. 7 of 1953.
4. L.R. 61 I.A. 398 : I.L.R. 56 All. 645 : 67 M.L.J. 664 (P.C.).

The above four principles were reiterated by the Judicial Committee in *Nur Mahmad* v. *Emperor*[1]. *Sheo Swarup's case*[2] laid down the law on the subject for the guidance of all the Indian High Courts.

In *Surajpal's case*[3], their Lordships Fazl Ali and Bose, JJ., set aside the conviction and sentence passed by the High Court of Allahabad and restored the order of acquittal passed by the Sessions Judge of Aligarh on charges of murder and rioting. Their Lordships observed :

"....It is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court....can be reversed only for very substantial and compelling reasons".

The doctrine of substantial and "compelling reasons" which expression was first used in *Surajpal's case*[3] was examined and its history ascertained by the Supreme Court in *Aher Raja Khima* v. *State of Saurashtra*[4].

The accused in this case was tried on a charge of murder and acquitted by the Sessions Judge. On appeal by the State the accused was convicted by the High Court. On appeal to the Supreme Court Mr. Justice Bose and Mr. Justice Chandrasekhara Aiyar held that the Sessions Judge gave good reasons to find that the confession, the only evidence, was not voluntary and was retracted at the earliest opportunity. No Police Officer was examined to displace the charge of threat and coercion. A few other circumstances were consistent with the innocence of the accused. Hence their Lordships allowed the appeal and held that the High Court had no strong and "compelling reasons" to set aside the acquittal.

Mr. Justice Venkatarama Ayyar differed from the majority view and held that the appeal ought to be dismissed. His Lordship observed:

1. That the scope of appeals against acquittal is not different from that of other appeals. In appeals the burden of showing that the judgment appealed from is wrong is upon the appellant. "When the State appeals against an order of acquittal it has to establish on the evidence that the accused is guilty and to establish it, it has to satisfy the Court that the judgment of the trial Court is erroneous. The oft-repeated observation that on acquittal the presumption of innocence becomes reinforced is merely this principle stated in terms of Criminal Law."

2. "Likewise the weight to be attached by an appellate Court to a finding of the trial Court based on appreciation of oral evidence is the same whether it is given in a civil litigation or in a criminal trial".

3. An appeal against acquittal under section 417 stands as regards the power of an appellate Court on the same footing as appeals against conviction.

4. "The words 'compelling reasons' are not legislative expression. They are not found in section 417. As far as I have been able to discover, it was first used in (*Surajpal's case*)[3]...The words are vague and indefinite to a degree". Sometimes even "when Judges hearing appeals under section 417 were convinced of the guilt of the accused they refrained from setting aside the order of acquittal owing to the dark and unknown prohibition contained in the expression".

5. "To fetter the right to appeal against acquittal through such expressions as 'compelling reasons' would not merely be to legislate but to defeat the plain intentions of the Legislature that the accused in an appeal against acquittal should have only those rights which the State in an appeal against a conviction or a respondent in a civil appeal has and that he is to enjoy no special protection."

6. "As no appeal on facts is provided, the decision of the High Court is not open to review by the Supreme Court under Article 136 on the ground that there were no compelling reasons for the learned Judges of the High Court to reverse an order of acquittal."

These are, if I may say so with respect, weighty observations. Questions of fundamental importance have been raised in the minority judgment. The Supreme

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1. (1945) 2 M.L.J. 362 (P.C.).
2. L.R. 61 I.A. 398 : I.L.R. 56 All. 645 : 67 M.L.J. 664 (P.C.).
3. (1952) S.C.J. 32 : (1952) 1 M.L.J. 426.
4. (1956) S.C.J. 243 : (1956) 1 M.L.J. (S.C.) 135 : (1955) 2 S.C.R. 128 (S.C.).

Court, it is submitted, will reconsider the question and give a final answer to the questions raised.

A Division Bench of the Bombay High Court in *State of Bombay* v. *Vithal Maruti*[1], had to dismiss the appeal by the State as the Court was bound by the doctrine of 'compelling reasons'. Their Lordships however observed as follows :—

"It is quite true that the earlier decisions of the Privy Council *Sheo Swarup* v. *King-Emperor*[2] and *Nur Mohammad* v. *Emperor*[3], where this question has been examined on principle and in the light of the provisions of section 417 were not cited before the Supreme Court. It is also true that their attention was apparently not drawn to the fact that there was a sharp difference of opinion on this question which had been taken before the Privy Council and the Privy Council had expressed themselves against the view that sought to impose limitations upon the powers of the appellate Court in dealing with criminal appeals against acquittal under section 417, Criminal Procedure Code".

It has also to be decided by the highest Court whether the rigour of the rule against interference with orders of acquittal is less in cases where the High Court is to examine the grounds of acquittal of a person who was convicted by the trial Magistrate but acquitted on appeal by the Sessions Judge. That it is somewhat less is the view taken in two Mysore cases : (1) *State* v. *K. Basappa*[4] and in (2) *State* v. *Sampangiramiah*[5]. Reliance was placed in the first Mysore case on *Emperor* v. *Md. Khan*[6] where it was held that whatever may be the value of the judgment of a trial Court which has had the opportunity of seeing the witnesses and observing their demeanour no such reason can apply where the trial Court convicted the accused and it is the appellate Court which acquits.

There is force, if I may say so, in these observations. It has to be remembered that in *Sheo Swarup's case*[2] the trial Court acquitted and the High Court convicted the accused. Similarly in *Surajpal's case*[7] and in *Aher Raja Khima's case*[8] the trial Court acquitted and the High Court convicted the accused.

Another point which does not appear to be covered by authority is whether the High Court hearing an appeal under section 417 (3) has the same powers and limitations as in the case of an appeal under section 417 (1), Criminal Procedure Code. Once special leave is granted, both classes of appeals, it is submitted, stand on the same footing and should be disposed of on the same principles.

SOME ASPECTS OF THE LAW OF COMPENSATION FOR RAILWAY ACCIDENTS

By

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The recent rise in the frequency of Railway accidents calls for an examination of the principles of liability of the Railway Administration to pay compensation in respect of the accidents.

Sections 82-A to 82-H of the Railways Act IX of 1890 provide for payment of compensation for loss occasioned by death of a passenger dying as a result of the accident and for personal injury and loss or deterioration of movables owned by the passenger sustained as a result of such accident. Pursuant to the section 82-A the Railway Accidents (Compensation) Rules, 1950, have been framed to carry out the object of sections 82-A to 82-H.

The liability under the statute is independent of any wrongful act or neglect or default on the part of the Railway administration such as would entitle a

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1. A.I.R. 1953 Bom. 369.
2. (1934) 67 M.L.J. 664: L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).
3. (1945) 2 M.L.J. 362 (P.C.).
4. A.I.R. 1953 Mys. 75.
5. A.I.R. 1953 Mys. 80.
6. A.I.R. 1930 Lah. 403.
7. (1952) S.C.J. 32 : (1952) 1 M.L.J. 426.
8. (1956) S.C.J. 243: (1956) 1 M.L.J. (S.C.) 135 : (1955) 2 S.C.R. 1285 (S.C.).

person who is injured or has suffered a loss to maintain an action in tort. Still, a suitor is seldom in a position to successfully prove negligence of the Railway as a substantive fact, not to speak of the possible defences open to the State-owned Railways. The result is that recourse is mostly had to the statutory right to obtain compensation.

As one who had appeared in several proceedings last year before the Claims Commissioner for the Ariyalur Railway disaster of November 23, 1956, the writer seeks to point out some of the lacunae in the Act and the rules and offer suggestions for amendment as set out *infra* :

1. The maximum limit to the compensation awardable to any one person for death or disablement and for loss of goods, etc., is fixed at Rs. 10,000 in clause 2 of section 82-A (inserted by Act III of 1943). Quite apart from modern notions regarding the dignity and worth of the human person, the maximum limit could be easily raised to Rs. 20,000 in view of the increase in the earning capacity, actual and potential, of individuals and the enhanced cost of living and of personal effects in an inflationary economy.

2. The rules contain a schedule detailing the rates of compensation according to the monthly salary or the annual income of the deceased or injured person. Unless a passenger is an earning member on the date of the accident no compensation can be granted to him in case of disablement caused by the injuries or to his dependants in case of his death. It is a moot question whether a highly qualified university or professional man waiting to be employed or his heirs can have the benefit of the provision. Again, what about the passenger who is a minor ? In case of death of a minor child, whether or not it may be proper to apply the principle of loss of service recognised in actions for seduction, compensation could be paid to the parent not merely on the ground of loss of child as such (*i.e.*,) as a potential wage earner but also on the ground of grief and distress. In case of disablement, payment of compensation to a minor can be justified on the basis of loss or curtailment of physical and mental faculties and also on the basis of shortened expectation of life besides anguish caused.

3. Further, as pointed in *Sureshchandra Ray* v. *East Indian Railway*[1], there is a lacuna in the rules in so far as they have not provided for rates of compensation payable in respect of temporary disablement. In the instant case, the Patna High Court allowed some compensation to a person who has sustained loss of earning by reason of slight injuries and by his being confined to bed for some days. Ahamad, J., in dealing with the question observes "the lacuna requires immediate attention of the authorities concerned. Otherwise there will be a regular source of confusion in the matter of awarding damages in cases covered by section 82-A. The definition under the Workmen's Compensation Act, 1923, includes disablement both of a temporary or a permanent character. It is obvious that what has happened is that definitions of partial disablement and total disablement as given in the Workmen's Compensation Act have been adopted *in toto* but the schedule of different tables given in the Workmen's Compensation Act for partial disablement and total disablement has been adopted *only in part* giving rise to a lacuna therein ".

4. Neither section 82-A nor the rules give any indication that medical expenses reasonably incurred by the injured persons have to be taken into consideration in fixing the amount of compensation.

5. A more intelligible, precise and rational definition of " dependants " could be thought of instead of merely copying the definition of the term given in the Workmen's Compensation Act which has led to a vast mass of conflicting authority.

Will the Union Government revise the rules in the light of the above and place them before the Parliament as required under section 82-J (3) of the Act ?

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1. A.I.R. 1954 Pat. 507.

MADRAS AGRICULTURISTS' RELIEF ACT—SECTION 13-A

By

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As remarked by Mr. Justice Venkataramana Rao in *Official Receiver, Guntur* v. *Seshayya*[1], "every section (of the Act) bristles with difficulties and it is no wonder that the Act has become a fruitful source of litigation". Anamolies in the Act have been pointed out from time to time by the High Court, but most of them are still to be rectified. The last Amending Act is Act XXIV of 1950 and it is high time that a fresh Amending Act is passed by the Legislature correcting at least the glaring anamolies in the Act.

There are anamolies even in the Amending Acts. One glaring example is section 13-A added to the main Act by section 8 of the Amending Act XXIII of 1948. This new section reads "Where a debt is incurred by a person who would be an agriculturists as defined in section 3 (ii) but for the operation of Proviso B or Proviso C to that section, the rate of interest applicable to the debt shall be the rate applicable to it under the law, custom, contract or decree of Court under which the debt arises or the rate applicable to an agriculturist under section 13, whichever rate is less".

In the case reported in *N. V. Govindaraja Nadar* v. *T. Namadevar Reddiar*[2], their Lordships Mr. Justice Somasundaram and Mr. Justice Ramaswami Gownder have held that the effect of section 13-A is to extend the benefit of the Act to all agriculturists irrespective of the ban imposed by Provisos B and C to section 3 (ii) of the Act and that the language of the section does not in any way restrict the debt to one incurred after the Act or Amendment.

With great respect to their Lordships, it does not seem to be clear that section 13-A applies to debts incurred after the commencement of the Act. Even as regards debts incurred before its commencement there is some obscurity as to whether it applies to all such debts. The matter seems to require clarification.

Ex facie, the section provides that even agriculturists coming within Proviso B of section 3 (ii) (paying profession-tax on a half yearly income of more than Rs. 600 in all the four half years immediately preceding 1st October, 1937) or Proviso C. (paying property or house tax on an annual rental value of more than Rs. 600 in all the four half years immediately preceding 1st October, 1937 of section 3 (ii) are bound to pay the rate of interest provided in section 13 which is 5½ per cent. per annum under the Government Notification, dated 7th July, 1947).

It is significant that though this new section refers to the rate of interest provided in section 13, it does not state that the benefit of the section extends to agriculturists as defined in section 13. The marginal note to section 13 states, "rate of interest payable by agriculturists on new loans, " while the marginal note to section 13-A. reads, "rate of interest payable by certain persons on debts" indicating thereby that the agriculturists for whose benefit section 13 is enacted are not the persons meant to be benefited by section 13-A.

If section 13-A applies even to agriculturists coming within the scope of *Explanation* (ii) to section 13, it will mean that *Explanation* (ii) is practically repealed as it would be a dead letter after the incorporation of section 13-A. If that were the intention of the Legislature, it could have expressly enacted to that effect. On the contrary, the amended definition of an agriculturist in section 13 with the Amended Provisos B and C, has been incorporated in the main Act by the same Amending Act XXII of 1948 which has added the new section 13-A. This shows

1. (1940) 2 M.L.J. 860 (868). 2. (1956) 2 M.L.J. 425.

that, section 13-A could not have been intended to negative the effect of the said amendment of Provisos B and C in section 13 by the same Amending Act.

It seems therefore that the new section 13-A cannot restrict the scope of section 13 which has been held to provide a complete machinery for scaling down of all debts subsequent to the main Act (Vide *Thiruvengadatha Aiyangar* v. *Sannappan Servai*[1].

The question then arises as to what extent it will affect agriculturists coming within the scope of Provisos B and C of section 3 (ii), which must be deemed to apply only to loans before the commencement of the Act as section 13 applies to all loans after the Act. Can section 13-A be taken as impliedly abrogating Provisos B and C to section 3 (ii)? In *Venkatanarayana Rao* v. *Champalal*[2], His Lordship the Chief Justice has stated " we fail to see anything in section 13-A which has the effect of repealing by implication Provisos B and C. That section deals only with one subject-matter *viz*., the rate of interest payable by *certain* persons......It certainly does not confer any new procedural right on persons who did not have that right before the insertion of the section. We cannot attribute to the Legislature the intention of repealing portions of the Statute by implication when the Legislature could have expressly and simply obtained the same effect by direct repeal. Apart from this well approved canon of construction, our conclusion is also based on an interpretation of the language of section 13-A which does not lend any support to the contention."

These observations only show how obscure is the scope of appplication of section 13-A, even as regards all loans incurred before the commencement of the Act as section 13-A cannot co-exist with the Provisos B and C to section 3 (ii) which remain unrepealed either expressly or by implication. It follows that the decision reported in *N. V. Govindaraja Nadar* v. *T. Namdevar Reddiar*[3], requires re-consideration by a Full Bench.

If it is the intention of the Legislature to repeal Provisos B and C in both or either of section 3 (ii) and section 13, it should do so expressly and repeal section 13-A as being unnecessary: if it is the intention to retain them, section 13-A may be deleted. Till either course is adopted, retention of section 13-A in the Statute book only serves to furnish one more fruitful source of Litigation.

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1. (1941) 2 M.L.J. 307.
2. (1951) 2 M.L.J. 530.
3. (1956) 2 M.L.J. 425.

PAST CONSIDERATION—A NOTE

By

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Our law of contract has accepted the principle, when it declares that an agreement enforceable by law is a contract[1], that all promises are not *ipso facto* enforceable[2] but only those promises are enforceable which conform to certain requirements of the law and has proceeded to prescribe[3] "consideration" as a *sine qua non* for the enforceability of a promise. Yet the provisions of the Contract Act as to what constitutes consideration are by no means satisfactory and are least conducive for evolving a theory of contract in our law. The Act has even failed to enunciate that consideration must be of some value in the eye of law and nowhere is it said that consideration must consist of some detriment to the promisee or benefit to the promisor. The Act is avowedly incomplete[4] and, therefore, our Judges have, not unjustifiably, resorted to the aid of the English law in interpreting its imperfect provisions. But the Act is far from a faithful codification of the English law and has often made radical departure. For instance, it has discarded the fundamental principle of that law that consideration must move from the promisee and has adopted a much wider definition of consideration. It is, therefore, dangerous to assume that the principles of the English law are applicable in this country without due regard to the provisions of the Act and it is of the utmost importance to examine the provisions of the Act independently and discover the extent to which they are at variance with the English law. It is a matter for deep satisfaction that the Law Commission has taken up, and perhaps completed, the task of revising this outdated[5] enactment and we hope that the law will be reformed thoroughly and placed on a firm foundation with that amount of certainty which this ever evolutionary branch of the law will admit of. Though the object of this note is not so lofty as to suggest reforms of the law, it may not be out of place to mention that any future revision of the Act ought to be a radical overhauling and that the law relating to consideration must be formulated in an exclusive chapter instead of being scattered, as it now is, over a number of oddly placed sections.

The only question that is proposed to be examined in this note is how far past acts or abstinences will constitute good consideration for a promise under our law.

The element of bargain is present in every contract and in English law consideration means something of value bargained for or exchanged for the promise. By using the analogy of sale, Pollock defines consideration as the price for which the promise is bought[6]. It consists more often in some detriment to the promisee and at others in some benefit to the promisor. This detriment must be suffered by the promisee in pursuance of the promise made to him. If he had suffered the detriment independently of and anterior to the promise, it is said to be past consideration and cannot support a subsequent promise. Hence it is said that "past consideration is no consideration." In fact "past consideration" is a misnomer in English law, compendi-

1. The Indian Contract Act, 1872 (Act IX of 1872), *Section* 2 (*h*).
2. *Cf.* German law which requires neither "cause" nor "consideration".
3. *Section* 25 : "An agreement made without consideration is void, etc." *Section* 10 : "All agreements are contracts if they are made. . . . . for a lawful consideration."
4. *See* the preamble.
5. "Unfortunately it (the Bill) had been sent out to India in a very crude form; it never underwent the patient, penetrating revision of a skilled draftsman necessary in the case of such a measure; and though the Indian judges have loyally endeavoured to give effect to its provisions, these are so incomplete and sometimes so inaccurately worded that the time seems to have come for repealing the Act, and re-enacting it with the amendments in arrangement, wording and substance, suggested by the cases decided upon it during the last fourteen years". Whitley Stokes: Anglo Indian Codes, Vol. I—(1887), page 534. The Act has, however, lived long and is now 85 years old.
6. Pollock on Contracts, 13th Edition, page 133.

ously used to denote acts or forbearances done or suffered independently of and anterior to the promise. They are unbargained for and unrelated events of the past which merely motivate the promise and are no consideration for it. Thus in *Roscorla* v. *Thomas*[7], where a horse was sold without warranty and later the vendor promised the buyer that the horse was free from vice, which it was not, it was held that there was no consideration for the new promise, the earlier sale being no consideration for it. To cite a recent case: In re *McArdle*[8], where a lady made vast improvements spending large sums of money to the house belonging to her husband and brothers-in-law without their request and was later promised by all of them to be compensated, the Court of Appeal held that the consideration was past and hence the promise was unenforceable. With the abandonment[9] of Lord Mansfield's doctrine of moral obligation the confusion that had surrounded English law cleared and it is now well-settled that past consideration is no consideration[10].

Turning to our law we find that it still controversial whether a past act or abstinence is good consideration for a promise and different conflicting views have been expressed. The more common view seems to be that "past consideration is good consideration " under our law[11], and that the Contract Act has departed from English law in this respect as in others. This view would appear to proceed from the words "has done or abstained from doing" used in the definition of consideration[12] which is said to give recognition to past consideration as good under our law. It is also argued that the cumulative effect of the definition in section 2, clause (*d*) read with section 25, clause (2) would be to render all past acts and abstinences good consideration for a promise under our law. The opposite view has also been expressed[13], that past consideration is no consideration in our law as in the English law, that the framers of the Act who were familiar with the English law had a "partiality" for that law and that the provisions of the Act do not warrant a conclusion that they intended to admit as good consideration what had been *in toto* rejected as no consideration in the English law.

In examining these two diametrically opposite views we should keep our mind free of the recommendations of the Law Revision Committee in England in 1937[14] for the admission of past consideration. We have to seek our law from the expressed provisions of the Contract Act, however unsatisfactory they might be in their exposition of the fundamental principles of the law of contract.

We can for the purpose of this inquiry broadly classify past acts and abstinences (hereafter called past services for the sake of brevity) into :

I. Past services rendered gratuitously—
   (*a*) at the request or desire of the promisor ;
   (*b*) without the request or desire of the promisor.

II. Past services rendered with no intention of doing so gratuitously—
   (*a*) at the request or desire of the promisor ;
   (*b*) without the request or desire of the promisor.

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7. L.R. (1842) Q.B. 234.

8. L.R. (1951) 1 Ch. 669 : (1951) 1 All E.R. 905.

9. *Eastwood* v. *Kenyon*, (1840) 2 A. & E. 638 : 52 R.R. 400 exploded Mansfield's Doctrine.

10. In American law the general rule is identical with English law : Williston on Contracts, Section 142.

11. *Namberumal* v. *Veeraperumal*, 59 M.L.J. 596 : A.I.R. 1930 Mad. 956 at 960 per Ramesam, J., "In Indian law past consideration is good consideration, etc.—" T. S. Venkatesa Iyer's The Law of Contract, 2nd edition pages 90, 91.

12. *Section 2, Clause* (*d*) : "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise ".

13. K. Venkoba Rao's Commentaries on the Indian Contract Act (1955), pages 27 and 28.

14. The Committee have recommended in their Sixth Interim Report : " That an agreement shall be enforceable, if the promise or offer be supported by valuable consideration, past or present ".

I. PAST REQUESTED AND VOLUNTARY GRATUITOUS SERVICES.—If services are rendered without any intention of claiming reward as of right, both parties having understood that the services were to be gratuitous, it is difficult to see how such gratuitous past services could form good consideration for a promise[15]. Though sections 2 (*d*) and 25 (2) would appear to be wide enough to cover such acts as well, it is submitted that they should be understood to refer to "something not intended to be gratuitous". "It is not reasonable that one should do another a kindness, and then charge him with a recompense"[16]. In such cases the promise is clearly gratuitous and is perhaps made for reason such as gratitude which are no more than motives for the promise. As Pollock observes[17], in such cases there is no "foundation for a contract". In *Raja of Venkatagiri* v. *Raja Rao Sri Krishnayya*[18] where the promise was made in consideration of advances which had been made "without any intention of claiming repayment", the Privy Council held that such consideration will not be good either under section 2 (*d*) or section 25 (2). That is a case to show that all past services will not be good consideration in Indian law. To hold that past gratuitous services will constitute good consideration for a subsequent promise would be to confound motive for consideration and there is no warrant for the view that the framers of the Contract Act intended to treat them as synonymous. "Voluntarily" in section 25 (2) does not imply "gratuitously". The American law is succinctly stated by Corbin on Contracts : "If the past unrequested performance was rendered as a gift, a subsequent promise of compensation made by the donee will not be enforced. Such is the case even though the gift performance was rendered as such at the request of the recipient"[19]. It is submitted that it is a fundamental principle of the law of consideration that a gratuitous act or abstinence cannot constitute consideration for any promise and that the law in India is the same as the English or American law[20] in this respect. It is not every promise that the law enforces, but only those fulfilling certain requirements, one of them being consideration. We are at liberty to abolish that requirement, if we feel that it is a historical accident of the English law that handicaps our law. But so long as it exists, it should serve a meaningful existence and ought not to be watered down to make its presence in the Act a farce. If this view is accepted, it makes little difference whether the past gratuitous service was rendered at the request of the promisor or voluntarily and in neither case will it fall under the provisions of the Act. It may not be out of place to point out here that where the past services were rendered gratuitously, the person benefiting by them is under no quasi-contractual liability either to make recompense for them[21]. No liability, either contractual or quasi-contractual, can arise out of such services. To sum up, "past gratuitous service is no consideration for a promise".

II. (*a*) PAST SERVICES, NOT BEING GRATUITOUS :

Rendered at the request of the promisor.—Such past services will clearly fall within the words of section 2, clause (*d*) : "When at the desire of the promisor, the promisee or any other person, has done or abstained from doing something such act or abstinence is called a consideration." There are no restrictions as to the nature of the past services or the subsequent promise and all that is necessary is that the promise should have been made in consideration of services rendered in the past at the request or desire of the promisor. It is a recognition of the principl in *Lampleigh* v.

15. A. C. Dutt's Commentaries on the Indian Contract Act, Ed. II, however, states at page 42: "Gratuitous services rendered at the request of the defendant are a good consideration for a subsequent promise to pay".

16. 1 Wm. Saund, 356 quoted in Pollock on Contract, Ed. 13, page 143, f.n. 52.

17 Pollock on Contracts, page 143.

18. I.L.R. (1949) Mad. 300 : (1948) 2 M.L.J. 260 (P.C.).

19. Corbin on Contracts, page 770, S. 234.

20. A few Courts in America have enforced such promises to pay for a past consideration, even though it was intended to be gratuitous at the moment it was given. But this view has not been taken by most of the Courts in the United States. *See* Williston on Contracts, pages 144 to 146.

21. Section 70, Indian Contract Act, *Illustration* (*b*).

Brathwait[22] that a "mere voluntary courtesy will not have a consideration to uphold an assumpsit", but if the service was "moved by a suit or request" of the promisor, the promise "couples itself within the suit before". For long this principle was supposed to be an exception to the rule against past consideration but in modern English law it is no longer considered to be so and has been interpreted to apply to such cases where the past services rendered at request and the ensuing promise can be treated as single transaction *ab initio* and the past services would give rise to quasi-contractual liability even in the absence of the express promise. In the language of Dr. Cheshire and Mr. Fifoot, "the original request was accompanied by a tacit understanding of recompense, and even if no express promise had ensued, the plaintiff might still have recovered reasonable remuneration on a *quantum meruit*. The express promise did little more than relieve the Court of the necessity of valuing the services"[23]. The law in England on this matter still seems to be unsettled [24] and it is not clear whether part requested performance will support a promise made after any length of time or only a promise made after a reasonable time so that the performance and the promise might be regarded as one transaction. In India the principle has been couched in the widest terms in section 2, clause (*d*) and, therefore, seems to be wider than modern English law. The tendency in English law would seem to be to assimilate this principle by extending the definition of "executed consideration" and not to admit this as an exception to the well-settled rule that "past consideration is no consideration." However, it cannot be denied that the doctrine of *Lampleigh* v. *Brathwaite*[22], is a recognition that past service, if rendered at request, is good consideration for a subsequent promise. As Erle, C.J., observes in *Kennedy* v. *Brown*[25]. "The peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed". It is indeed an instance of prior or past executed consideration and we in India, not being averse to the recognition of past consideration, need have no extended definition of executed consideration to accommodate such past services and no hesitation to acknowledge that past consideration is good consideration in those circumstances.

To sum up, "past requested acts or abstinences are good consideration for a subsequent promise in our law."

(*b*) *Rendered without the request of the promisor.*—These can conveniently be called "past voluntary services" and will come under section 25, clause (2). The Act has recognised them to be good consideration only under very restricted circumstances and they will not always constitute good consideration for any subsequent promise. There are restrictions both as to the nature of the past services as well as the promise itself. To the extent past voluntary services are recognized as good consideration, Indian law has made a sharp departure from English law where they can under no circumstance constitute good consideration. It is, therefore, necessary to examine them in some detail.

(i) Past voluntary services will form good consideration if:

(*a*) they were rendered "voluntarily";

(*b*) they consist of something already "done";

(*c*) they were done by the promisee;

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22. (1614) Hobart, 195; see also *Wilkinson* v. *Olivera*, (1835) 1 Bing. N.C. 490; *Stewart* v. *Casey*, L.R. (1892) 1 Ch. 115.

23. Cheshire & Fifoot, Law of Contracts, Ed. 3, pages 57-58.

24. Pollock on Contracts, Ed. 13, page 143: "It is still not quite settled whether a past benefit in any case is a good consideration for a subsequent promise. On our modern principles it should not be, and it is admitted that it is generally not. It is said, however, that past services rendered on request, no definite promise of reward being made at the time, are a good consideration for a subsequent express promise in which the reward is for the first time defined. But there is no satisfactory modern instance of this doctrine and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth".

25. (1863) 13 C.B.N.S. 677.

(*d*) they were done "for the promisor" or they were what the "promisor was legally compellable to do."

(ii) They will constitute good consideration only for a "promise to compensate" for such services.

It is not every past act or abstinence and any subsequent promise which will fall under section 25, clause (2) and the case of *Raja of Venkatagiri* v. *Raja Rao Sri Krishnayya*[26], is a striking illustration of the same. It will be necessary to examine here the conditions which the past service and the promise must satisfy to fall within its ambit.

(i) (*a*):—*The services should have been rendered "voluntarily"*.—The term "voluntarily" is not defined in the Act and on a comparison of section 25, clause (2) with section 2, clause (*d*) would appear to be the antithesis of "at the desire of the promisor." To this must be added the *ratio decidendi* in *Raja of Venkatagiri's case*[26] referred to before and "voluntary" must be understood to signify "without the desire or request of the promisor and without the person rendering the service being under an obligation to do so." In that case the promisee had advanced moneys, there being no intention of claiming repayment, to the promisor for defending certain litigation, not at the desire of the promisor, but in purusance of a binding agreement which the promisee's grandfather had entered into with the father of the promisor. The Privy Council held that the advancement of the moneys was not "voluntary." The test adopted by the Privy Council in determining whether the act was voluntary or not is not clear[27]. It is, however, submitted that the word should not be so narrowly construed as to limit it to acts done *suo moto* but must be understood to mean all acts done by the promisee without the request of the promisor and without the promissee himself being under an obligation to do the act either by virtue of the law or any binding contract with any person. To hold that only an act done by a person of his own accord will be a voluntary act will lead to anomalous consequences. For instance, if a doctor attends on an unconscious patient at the request of a neighbour of the patient, who himself does not intend to pay for the doctor's services but expects the patient to do so after recovery and later the patient makes such a promise to pay the doctor, it will be illogical to contend that the doctor cannot enforce the promise as he did not act of his own accord but at the desire of a third party. It would be to penalise the doctor for acting at the request of a third party.

Where the services are rendered at the desire of the promisor, they will constitute good consideration under section 2 (*d*) and it is not necessary to debate the question whether they can even in that case be considered "voluntary" within the meaning of section 25 (2)[28].

(i) (*b*) : *The services must consist of something already "done"*.—Section 2 clause (*d*) uses the words "do" and "abstain" in rhetorical symmetry throughout, while section 25, clause (2) only reads : "It is a promise to compensate wholly or in part, a person who has already voluntarily done something" and does not read "a person who has already voluntarily done or abstained from doing something." This omission may be accidental and has not been judicially considered. It will be illogical to hold that past voluntary act may be good consideration but not a past voluntary forbearance. However, the scope of these words is not yet clear.

(i) (*c*): "*They were done by the promisee.*".—Under section 25, clause (2) it is absolutely necessary that the past service ought to have been rendered by the promisee himself and not a third party and the promise is to compensate him (the promisee) for such service. It is, therefore, obvious that while consideration for a promise may under section 2, clause (*d*) proceed from the promisee or any other person, the consideration for a promise to compensate under section 25, clause (2) should

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26. I.L.R. (1949) Mad. 300 : (1948) 2 M.L.J. 260 (P.C.).

27. *Durga Prasad* v. *Baldeo*, I.L.R. 3 All. 221, is also not helpful in this respect as there, it was held that the act was not done "for the promisor". See *f.n.* 29 *post*.

28. *See* Mukerji, J.'s dissenting judgment in *Suraj Narain Dube* v. *Sukhu Aheer*, 112 I.C. 159 (F.B.).

have proceeded from the promisee only and not a third party. While the Act accepts the principle that a third party to a consideration can sue, it does not extend it to cases of past voluntary service. This is an important restriction on the scope of the applicability of section 25, clause (2). It is also clear that no one can be compensated for what he has not himself done. Thus if *A* did a voluntary service for *B* for which *B* promises to pay *C* a sum of money, *C* cannot enforce the promise at all.

(i) (*d*) : *The past voluntary service must have been done for the promisor*".—The definition of consideration in section 2 (*d*) does not require that the act or abstinence must be something done or suffered for the promisor and they may have been rendered for a third party. But a past voluntary act ought to have been done for the promisor and if it had been rendered for a third party[29], or the promisee himself, they cannot form good consideration under that clause. Thus if a tenant voluntarily and unauthorisedly effects improvements to the house of his landlord, not for the benefit of the landlord but for his own comfort and convenience, a subsequent promise by the landlord, it would appear, will not fall within section 25 clause (2). To quote an illustration form the American authority, Corbin on Contracts, "Suppose that Samaritan feeds and clothes needy stranger. Later Generous Observer promises to reimburse Samaritan. There are no cases indicating that Observer will be bound by his promise.[30]"

The past voluntary act may consist of some act which the promisor was "legally compellable to do." This again is a departure from the English law as it now exists. In English law, it was once thought "that the voluntary doing by one party of something which the other was legally bound to do is a good consideration for a subsequent promise of recompense".[31] Anson on Contracts, referring to them says : "We find it laid down that 'where the plaintiff voluntarily does whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof expressly promises', he will be bound upon such a promise. But it is submitted that the authority for this rule wholly fails, in so far as it rests on the cases which are habitually cited in support of it[32]". It is obvious that this part of section 25, clause (2) proceeds on a footing which is no longer accepted by the English law. Therefore, to that extent again the Indian law varies from the English law, though it is not easy to comprehend the scope of the clause in this respect.

(ii) The promise must be " to compensate" the person who had rendered the voluntary services : It is not every kind of promise that will be enforceable by virtue of the second clause of section 25. The promise must be one to compensate and this is an important restriction as to the applicability of that clause. It would even appear to be from the *Raja of Venkatagiri's case*[33] that the intention of the promisor in making the promise should be to compensate the promisee and that it would not be sufficient if the promise had the effect of making such compensation. Compensation would imply that the value of the promise must be reasonably commensurate with the service rendered and, though the law is not ordinarily concerned with adequacy of consideration, the Court is bound to inquire into the nature of the promise to find out the intention with which it was made. If the promisor promises to pay an amount out of all proportions to the services rendered so that no reasonable person would regard it as a compensation for the services rendered, it is submitted, the promise will not be enforceable by virtue of the provisions of section 25 (2).

It is submitted that the promise must also be such that the promisor could have validly made it when the services were voluntarily rendered. There is conflict of views, not only between the various High Courts but also between the decisions of

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29. See *Durga Prasad* v. *Baldeo*, 3 All. 221 where the voluntary act was not done " for the promisor ".

30. Corbin on Contracts, section 234, page 769.

31. Pollock on Contracts, Ed. 13 : see pages 143 144.

32. Anson on Contracts, Ed. 20, page 110.

33. I.L.R. (1949) Mad. 300 (309) : (1948) 2 M.L.J. 260 (P.C.), also see *Abdullakhan* v. *Purshottam*, I L.R. (1947) Bom. 807.

the same High Court[34] on this question. Though it is not possible to examine the decisions in this note, it is submitted that to hold differently would conflict with the well-established principles of our law regarding agreements by persons incompetent to contract. They are by section 11 a nullity and incapable of ratification after the incompetency has ceased to exist. A liability which in contemplation of law never could exist cannot constitute good consideration for a new promise. If a minor for whom services are rendered at his request under an agreement entered into during his infancy, and consequently void, cannot ratify such agreement after attaining majority, it will be strange that he could bind himself after majority to compensate for them if they had been rendered voluntarily. If so, persons supplying goods, other than necessaries, to minors would do well to supply them voluntarily and stand a chance of recovering compensation, but should never do so at the request of the minors for then a promise made by them after attaining majority to pay for them cannot be enforced at all.

III. TIME-BARRED DEBT.—Section 25, clause (3) provides that promise to pay a time-barred debt, wholly or in part, is enforceable subject to its being in writing and signed by the person to be charged therewith. The consideration for such a promise is definitely the past unenforceable debt. Even in English law which rigidly shuts out past consideration such promises are enforceable and about them Pollock observes : "It is said that the legal remedy is lost but the debt is not destroyed, and the debt subsisting in this dormant condition is a good consideration for a new promise to pay it. This is not logically satisfying, and in fact it belongs to the now discredited view of past consideration. There is no real equivalent for the new promise, and the only motive that can generally be assigned for it is the feeling that it would be morally wrong not to pay"[35]. Under section 25, clause (3) what is enforceable is the new promise and not the original debt and the consideration for the promise is indeed past.

CONCLUSION.

It is unsafe, therefore, to enunciate as a proposition of our law either that "past consideration is good consideration" or that "past consideration is no consideration."

1. Past gratuitous act or abstinence cannot constitute good consideration for a promise, irrespective of whether the act or abstinence was done or suffered at the desire of the promisor.

2. Past act or abstinence done or suffered at the desire of the promisor, is good consideration for a subsequent promise.

3. Past voluntary act will constitute good consideration for a promise to compensate for such act, provided the act and the promise fall within section 25 (2), but not otherwise.

4. Past time-barred debt is good consideration for a promise to pay the debt, if the promise complies with section 25 (3)[36].

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34. A promise by a person to compensate another for services rendered during his minority, have been held to be outside the scope of section 25, clause (2) in the following decisions: *Arumugam* v. *Duraisingha*, I.L.R. 37 Mad. 38: 21 M.L.J. 1077 ; *Indran Ramaswami* v. *Anthappar Chettiar*, 16 M.L.J. 422 ; *Bindeshri Bux Singh* v. *Chandika Prasad*, I.L.R. 49 All. 137 ; *Suraj Narain Dube* v. *Sukhu Aheer*, I.L.R. 51 All. 164 (F.B.): See also A.I.R. 1919 Lah. 19 and 228 ; A.I.R. 1935 Lah. 561 ; A.I.R. 1938 Lah. 159 ; A.I.R. 1934 Pesh. 123 ; A.I.R. 1919 Cal. 875 ; Decisions to the contrary: See *Karam Chand* v. *Basant Kumar*, 11 I.C. 321 ; *Sindha* v. *Abraham*, I.L.R. 20 Bom. 775, also 11 C.W.N. 135 ; A.I.R. 1921 Lah. 205 ; I.L.R. 46 All. 568.

35. Pollock on Contracts, Ed. 13, page 144.

36. It may be argued that section 25, clauses (1), (2) and (3) are exceptions to the requirement of consideration and, therefore, are *nuda pacta*. Such an argument, though plausible, is technical The promise in clause (1) is enforceable only if it is made out of natural love and affection, etc., in clause (2) enforceable only if it is made to compensate a past voluntary act and in clause (3) only if it is to pay a time-barred debt. The Act might be said to have treated these as good consideration under certain circumstances even though they do not fall within the definition of consideration in section 2, clause (*d*).

OFFENCES AGAINST RELIGION

(A CRITICAL REVIEW OF *Ramji Lal Modi* v. *State of U.P.*)

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The Supreme Court decision in *Ramji Lal Modi* v. *State of U. P.*[1], will be applauded by the people of India, who solemnly resolved. . . to secure to all its citizens, *inter alia*, liberty of. . . belief, faith, and worship[2]. The above decision upheld the constitutional validity of section 295-A, Indian Penal Code, which seeks to punish deliberate and malicious acts intended to outrage the religious feelings of any class by insulting its religion or religious beliefs.

The right to freedom of religion is a fundamental right and is contained in Part III of the Constitution, which gives it a secular character. A noticeable feature of the Indian body politic is that it comprises of classes of persons of diverse faith and beliefs. While the interests of a secular state entitle all persons to the right to profess, practice and propagate their religion freely, it is also not inconceivable that exercise of this right together with the right of free speech and expression may at times lead to a situation of communal frenzy in the hands of enthusiastic zealots of differing faith. Communalism thrives on scandalizing religion or religious belief of others. A legislation therefore, of the kind of section 295-A, Indian Penal Code is obviously meant to check such a situation. That section 295-A, Indian Penal Code, is constitutionally valid, tends to show that in India secularism has a fair chance to triumph over sordid communalism.

It is to be noted that section 295-A is contained in Chapter XV of the Indian Penal Code, which deals with offences against religion. The chapter, initially, contained four sections dealing with three principal offences, *viz.*, defiling or trespassing sanctuaries[3], causing disturbances in religious worship[4] and wounding of religious feelings[5]. Later section 295-A of the Penal Code was added to it by an amending Act *viz.*, Act XXV of 1927. The said legislation was enacted after the Mohammedans had set up a violent agitation following the abortive prosecution in *Rajpal's case*[6], (also known as *Rangila Rasul's* case). It introduced specific offence in the nature of wounding religious feelings of a class.

The principle which guided the Law Commissioners in framing this part of the Code is that " every man should be suffered to profess his own religion and that no man should be suffered to insult the religion of another ". The Commissioners stated further that " the religion may be false, but the pain which such insults may give to the professors of that religion is real. . . It is often. . . as real a pain and as acute a pain as is caused by almost any offence against the person, against property or against character. Nor is there any compensatory good whatso ever to be set off against this pain. Such insults, when directed against erroneous opinion, seldom have any other effect than to fix those opinions deeper and to give a character of peculiar ferocity to the theological dissension ; instead of eliciting truth they only inflame fanacticism "[7].

All these considerations apply with peculiar force to India. The Law Commissioners by making provisions for offences relating to religion expressedly recognised the peculiar prejudices and predilections of the Indian people. The principle that underlay these provisions is the preservation of spiritual comfort of the individual or the class of individuals. An interference with such comfort was to be visited with punishment in order to mitigate pain.

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1. (1957) S.C.J. 522 : (1957) 2 M.L.J. (S.C.) 65 : (1957) 2 An.W.R. (S.C.) 65: (1957) M.L.J. (Crl.) 771 (S.C.).
2. *Preamble* to Constitution of India (1950).
3. *Sections* 295, 297, Indian Penal Code.
4. *Section* 296, Indian Penal Code.
5. *Section* 298, Indian Penal Code.
6. 28 Cr.L.J. 721.
7. *Note J.*

It is to be noted that the Penal Code was constituted by four Law Commissioners of whom Lord Macaulay was the chief. Lord Macaulay was a staunch Benthamite. As the first law member of Council, " his whole project of judicial reform shows the profound influence of Bentham's legislative principles. He follows Bentham's principles so faithfully, indeed, that Sir Leslie Stephen considers Macaulay's Penal Code to be the first actual attempt to carry out Bentham's favourite schemes under British rule. He had the power and gift of persuasion to put Bentham's philosophy into practice "[8]. As a Law Commissioner who was entrusted with the responsibility of drafting the Penal Code we find Bentham's influence at various places in the elaborately drafted Penal Code which subsequently became the law. It was the principle of utility with its ultimate goal of human happiness which exhibited itself brightly in this part of the Code as well. By punishing deliberate insults to mere prejudices and predilections the Commissioners extended the scope of criminal law to acts which otherwise caused subjective harm like spiritual discomfiture. True, it is, that ferocity is incidental to theological dissensions and if aggravated may at times disturb public tranquillity. Nevertheless, the peculiar nature of these offences, as envisaged by the Law Commissioners indicate that the *primum mobile* of these measures have been the enigma of morals rather than the maintenance of public tranquillity for which provisions exist in the Code elsewhere.

The above perusal makes it abundantly clear that offences against religion in the Penal Code were enacted in the background of morals. In order to appreciate them fully a brief discussion on morality is therefore necessary.

Morality is a relative term. Morals as generally understood, stand in contradistinction to voluptuous notions. Anything which has tendency to inflame lust, deprave and corrupt the mind is immoral[9]. Indeed sensuous acts are opposed to morals because they are not deemed to be good. Morals are incapable of exhaustive definition. Usually they pertain to such techniques, patterns or standards of conduct which are underlined with an assumption or belief of being " good " or "right" or both. The expressions ' good ' or ' right ' are themselves ambiguous, yet they are intelligible in particular context of time and environment. Every society has a collection of morals. In other words each society prescribes from time to time, such patterns or standards of conduct which are deemed as good or right. The boundaries between the two are often mobile. A conduct is good if in turn it brings about a desirable result for the good of society or of the invidividual. Likewise, a conduct is right if it transcends the human frailities and conforms to some nobler ideas. Thus the legislative prescription of patterns or standards of conduct, which forbear causing of pain or spiritual discomfort to the professors of a faith are good because in turn they bring about spiritual comfort to person or persons collectively and have a harmonising effect on members of the society. These patterns are right in as much as they transcend the human frailities of intolerance towards the doctrines and dogmas of others.

Thus, we may sum up that morals contemplate the observance of such techniques, patterns or standards of conduct which either bring about desirable results for the good of society or of the individual or transcend the human frailities thereby conforming to some ethical principles. Therefore, any act which tends to transgress such conduct can be impinged by a legislative enactment as a measure required in the interests of morals.

Now we advert to the case of *Ramji Lal Modi* v. *State of U. P.*[10], decided by the Supreme Court. The case came up before the Court by way of petition under Article 32 of the Constitution of India. The petitioner had sought to challenge the constitutional validity of section 295-A, Indian Penal Code, as interfering with his right to freedom of speech and expression as guaranteed to him under Article 19 (1)

8. Dharkar—Legislative Minutes of Lord Macaulay.
9. See *Rex* v. *Hicklin*, (1868) 3 Q.B. Cases, 360.
10. (1957) S.C.J. 522 : (1957) 2 M.L.J. (S.C.) 65 : (1957) 2 An.W.R. (S.C.) 65 : (1957) M.L.J. (Crl.) 771 (S.C.).

of the Constitution and not saved by any of the restrictions mentioned in Article 19 (2)[11]. The learned counsel for the petitioner proceeded with an assumption that " the interest of public order " is the only thing in clause (2) of Article 19 which may possibly be relied upon by the State as affording a justification for its claim for the validity of the impugned section. He pointed out that insulting the religion or religious beliefs of a class of citizens of India may not lead to public disorder in all cases although it may do so in some. Therefore, where a law purports to authorise the imposition of restriction on the exercise of the fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right, the Court should not uphold it even in so far as it may be applied within the constitutionally permissible limits, as it is not severable. The learned counsel further contended that so long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.

In order to determine the constitutional validity of section 295-A, Indian Penal Code, the Court considered the question, *viz.*, " whether the impugned section can properly be said to be the law imposing reasonable restrictions on the exercise of the fundamental right to freedom of speech and expression in the interest of public order " and answered the question affirmatively. The Court observed :

(*i*) that the section punishes only those aggravated forms of insult to religion or religious beliefs of a class which are perpetrated with the deliberate and malicious intentions and have a calculated tendency to disrupt public order.

(*ii*) next, having regard to the ingredients of the offence created by the impugned section it can properly be said to be a law imposing reasonable restrictions on the exercise of fundamental right to freedom of speech and expression in the interests of public order.

It is, however, respectfully submitted that the Supreme Court in the said case reached a right decision with a wrong approach. In order to sustain the constitutionality of the impugned section the Court plodded over a brittle reasoning which is manifestly clear in the propositions arrived above by the Supreme Court. We shall now examine, *ad seriatim*, each of these propositions critically.

The Supreme Court observed that section 295-A of the Penal Code contemplates to punish only those aggravated forms of malicious and deliberate acts which have a calculated tendency to disrupt public order. It is submitted that such a conclusion is neither borne out by the words of the section nor does this fall in line with cases decided earlier by various Courts.

Section 295-A of the Indian Penal Code reads as follows :—

"Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words either spoken or written or by visible representations insults or attempts to insult the religion or the religious beliefs of that class, shall be punished. . . . . ."

It is to be noted that the section nowhere refers to ' disruption of public order ' as a constitutive element of the offence. A brief discussion of a few decided cases will be useful in understanding the meaning and scope of the section.

As stated above the necessity of introducing section 295-A in the Penal Code was actuated by the decision of Lahore High Court in *Rajpal's case*[12]. The section was the direct outcome of the abortive prosecution of one Rajpal who had published a pamphlet called the " Rangila Rasul " or the " Amorous Prophet " in which he described the incontinence of Prophet Mohammed. Rajpal was

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11. Article 19 reads as follows : " All citizens shall have the right—

(1) (*a*) to freedom of speech and expression........(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law, imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, dermation or incitement to an offence "

12. 28 Cr. L.J. 721.

tried under section 153-A, Indian Penal Code. The trial Court found him guilty for having made " a wanton attack upon the Prophet of Islam, to hold him up to ridicule and contempt, to ridicule his religion and thus to wound the feelings of his followers"[13]. The conviction and sentence was upheld by the Sessions Judge on appeal. A revision application was then filed by the petitioner Rajpal which was allowed by the High Court of Lahore. The Court held that section 153-A of the Penal Code was " not meant to stop polemics against deceased religious leaders, however scurrilous and in bad taste such attacks might be "[14]. The Court, however, visualised the lacunae in law and realised that the interference with religious feelings, as it was in this case, could have come within the tenor of provisions relating to preservation of religious sentiments and beliefs, but it could not be done so because of absence of an express provision. His Lordship, therefore, suggested :

" that a clause might well have been added to section 297 by which the publication of pamphlets published with the intention of wounding the religious feelings of any person or of insulting the religion of any person might be made criminal "[15].

The decision in the above case pointed out the lacunæ and yielded a violent agitation by Mohammedans with a view to remove the defect in law, which cumulatively resulted in the addition of section 295-A in the Code.

The decision in *Rajpal's case*[13] is important in so far as it pointed out the necessity of adding a section for purposes of protecting the religious sentiments from being wounded ensuring thereby spiritual comfort to the people. The decision nowhere indicated the necessity of adding such a clause for preserving public order.

Another illustrative case on the point is *The King* v. *Shwe Hpi*[16], decided by the Rangoon High Court. The facts of the case disclose that the acts of the respondent Shwe Hpi and others did not result into any disruption of public order, though they were held liable under section 295-A of the Penal Code. In this case the respondents had caused a book to be printed attacking Buddhist religion in most intemperate and provocative language. The publication and distribution of the book did not cause any resentment or disturbance for seven years when prosecution was launched. But the Court viewed that acts of the respondents brought themselves within the reach of criminal law and punished them under section 295-A, Indian Penal Code. Explaining the scope of the section the Court stated that " if the words used were bound to be regarded by any reasonable man as grossly offensive and provacative and were maliciously intended to be regarded as such then an offence would have been committed "[17]. This decision clearly amplified that it is the wounding of religious feelings, (not necessarily followed by public disorder) which is punishable under this section.

Similar is the view held by Mootham, C.J., in *Harnamdas* v. *State of U. P.* [18]. He observed that under section 295-A, Indian Penal Code, " the expressions used should be such as are not bound to be regarded by any reasonable man as grossly offensive and provocative maliciously and deliberately intended to outrage the feelings of any class of citizens "[19]. The malicious outraging of religious feelings was thus taken to be the crux of the offence in this case too.

Even *Ramjilal Modi's case*[20] shows that the facts which brought conviction to the petitioner under section 295-A were not of such an aggravated nature as to have

13. 28 Cr. L.J. 721.
14. 28 Cr. L.J. 721 (722).
15. 28 Cr. L.J. 721, 722-723.
16. I.L.R. (1939) Rang. 302.
17. I.L.R. (1939) Rang. 302 (306-7).
18. A.I.R. 1957 All. 538.
19. A.I.R. 1957 All. 538 (540).
20. (1957) S.C.J. 522 : (1957) 2 M.L.J. (S.C.) 65 : (1957) M.L.J. (Crl.) 771 : (1957) 2 An.W.R. (S.C.) 65 (S.C.).

a calculated tendency to disrupt public order. The punishments on the accused Modi, therefore, rested simply on the acts which were outrageous of religious feelings and beliefs of Mohammedans.

A survey of the statute law as well as earlier case-law sufficiently establishes that under section 295-A, Indian Penal Code, the malicious outrage of religious belief or sentiment has been the accepted gist of offence in this country so far. Never before the question of disrupting the public order was thought to be an ingredient of the offence. Thus we find that the introduction of the ingredient of "public disorder" or "disruption of public order", is an innovation of the Supreme Court. Obviously this is the result of brittle reasoning that the Court employed in the said case, merely because the Court endeavoured to sustain the constitutionality of the impugned legislation on the ground of 'public order'. The occasion for such an innovation would have not arisen had the Court tried to find out the purpose of the legislation by looking into the Report of the Law Commissioners. It has been the practice of the Indian Courts to refer to the Reports of the Indian Law Commission in construing the provisions of the Indian Penal Code with a view to ascertain the intent and purpose of the Legislature. In *Bhima Shaw* v. *The State*[21], Narasimham, J., of the Orissa High Court observed that "there is sufficient authority for the view that in construing the provisions of the Indian Penal Code and ascertaining the intention of the Legislature the report of the Indian Law Commissioners may be referred to"[22].

As has already been said above, Chapter XV of Indian Penal Code was contemplated by the Law Commissioners to be enacted in the background of morals. Thus the correct view for the Supreme Court to take in the case would have been to state that section 295-A of the Penal Code imposes reasonable restriction on the exercise of fundamental right of free speech and expression and is well saved by the permissible restrictive clause in Article 19 (2) as being in the interest of morals. By doing so the Court would have avoided the import of an extraneous ingredient of 'disruption of public order' which *prima facie* is absent in the section. It may be stated that in interpreting the scope of the section the Court inadvertently took the ostensible situation into account which is generally appended with such events as are related to the interference of religious sentiments. Moreover, it is convenient for the Courts to depend on the ground of 'public order' in Article 19 (2) in order to examine the constitutionality of the section even if the question of public order is incidentally connected. In other words, if section 295-A, Indian Penal Code, is to take into account only such malicious acts which have a calculated tendency to disrupt public order, it will then mean that all other acts which otherwise disturb the religious sentiments and beliefs are not punishable. This in effect would result in defeating the very intention of the legislature. Furthermore, an extensive use and application of the term 'public order' is apt to make the expression an unruly horse. It is, however, submitted that a deeper probe of this provision of the Penal Code would have led the Court to hold that the impugned section is a reasonable restriction on the right of free speech and expression as being in the interest of morals without narrowing down the scope of section 295-A. Thus a right decision could be well arrived at by a right approach.

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21. A.I.R. 1956 Orissa 177—(I.L.R. 14 Cal. 721 and I.L.R. 17 Cal. 852, followed.)
22. A.I.R. 1956 Orissa 177 (180).

ON ANCIENT AND PRESENT LEGAL SYSTEMS OF CHINA.

By
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Of the ancient legal systems of the world, that of the land of the Nile, is the earliest ; next comes that of the land of the Euphrates and the Tigris ; and the third in the march of time is that of the land of the Yellow River. It is the Chinese system that is even now a living fabric, while the Egyptian and the Mesopotamian systems lie buried under the rubbles of time.

Even in China, by the adoption of the Constitution of the Peoples Republic of September 20, 1954, the institutional aspect of the traditional Chinese legal system has had a metamorphosis. In fact, the tree of the change was planted even in 1911, when the throne of the Emperor of the Manchu dynasty fell, and in 1912, when was ushered forth a Republic. The personal type of dispensation of justice by the local Mandarin, the Provincial Governor, and the Imperial Emperor at Peking was substituted by the Constitution of 1954 by the "Peoples Courts". As per Article 73 of that Constitution, the highest judicial authority is the "Supreme Peoples Court." The next in the hierarchy is the " Local Peoples Courts ", as well as the "Special Peoples Courts." The President of each of these three sets of Courts has a term of four years. The Courts are independent, subject only to the law. However, the Supreme Peoples Court is responsible to the " National Peoples Congress ", which is the sovereign assembly of the people, in whom powers of every kind are vested, as the supreme organ of the people of China, as per Article 2 of their Constitution. Article 75 declares that the system of peoples' assessors applies in accordance with the law to the judicial proceedings in the Peoples Courts.

The jurisprudence to which these courts pay homage is fundamentally that of Confucius, one of the world's wisest men, who was a Chief Justice of China about B.C. 500. The general philosophy of life that underlies the Chinese system of law and justice is epitomised in one of the saying of Confucius : "As a Judge," he said, "I decide disputes, for that is my duty ; but the best thing that could happen would be to eliminate the causes of litigation." The almost religious respect for positive law that marks most western systems of law of the present day and of India, does not exist in China. Even today, the Chinese legal system depends upon the wisdom and the discretion of the peoples' assessors, rather than on the texts of the laws. This system has its own advantages, at any rate, the advantage of quick dispensation of justice, unlike the western product, which by its vulnerability to subtlety and by its fences of rules of procedure contributes to a great extent to the delayed justice.

It should not, however, be understood that there was no positive law in the old China. Only the Chinese did not worship at its altar in the same way as the votaries of the western systems of the present-day do. About B. C. 1200, the earliest code that of Chow, was composed by Tan, the Duke of Chow. At Peking, the Emperor, sitting as the Supreme Court was assisted by men learned in law, who reviewed the rulings of the lower Courts, as a Court of appeal and as a Court of revision. From time to time, collections of the leading decisions of the Supreme Court were published and studied as precedents ; and each judicial officer was provided with a copy of it. The trial Magistrate of the Old China had developed a high degree of professional skill with a combination of intuition and experience in discriminating, without the aid of a system of formal proof like our Evidence Act, between guilt and innocence, like, Solomon, who adjudged aright between the true mother and the false mother, who both claimed to be the mothers of one and the same baby.

Even the present Peoples Courts are stated to be manned and presided over by usually right men and women, and are stated to assure to the nation justice of the English equity pattern, though not of the strictly legal one, even as the old Mandarins, Magistrates, Governors, and Emperors did before. What fault can there be in continuing to be governed by the fudamental principles of a legal system that carried their nation successfully on its bosom through a period of more than 3000 years !

Indeed the Chinese legal system, which works well for China's 500,000,000 inhabitants, is worthy of study by all, who are keen on the introduction, in their own country, of a system of quick, simple, and cheap justice.

STAMP DUTIES AND STATE LEGISLATION

By

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Under the Constitution, rates of stamp duties on certain documents (bills of of exchange, promissory notes, etc., being instruments of a commercial character) are reserved exclusively for Central legislation with a view to secure uniformity all over India. Rates of stamp duties on other documents are reserved exclusively for State legislation. Collection and management of all stamp duties find a place in the Concurrent List. The entire revenue is assigned to the State in which the duties are collected and the entire management is vested in the revenue authorities of the State Governments. By Act XLIII of 1955, the Indian Stamp Act, 1899, has been extended to the whole of India including what were previously Part B States except Jammu and Kashmir. But by a Proviso to section 1 (2), it is enacted that it shall not apply to territories which were comprised in Part B States except to the extent to which the provisions of the Act relate to rates of stamp duty in respect of the documents specified in the Central Legislative List. That is, the Act applies to those territories only in regard to the rates of duties on certain documents and supersede the local Acts in force there only with regard to such rates. Though the Union Legislature could have made the Act applicable to those territories in regard to collection and management of these duties, it has not chosen to do so. The result is the provisions of the Act relating to collection and management are not applicable to territories which were comprised in Part B States, but the Acts in force in those territories continue to be applicable in regard to such matters.

As regards instruments other than those specified in the Union List, the Indian Stamp Act does not apply to the territories which were comprised in Part B States, both as to rates of duties and as to collection and management. The Union Legislature could have extended the Act to those territories as regards collection and management of those duties which is in the Concurrent List but it has not chosen to do so. The result is that the Acts in force in those areas are applicable in their entirety. One unexpected consequence of this position is that a document stamped according to the law in force in territories which were comprised in Part A States and Part C States would be chargeable over again with the whole duty prescribed by the local Act in force in territories which were comprised in Part B States if they relate to property situate or to any matter or thing done or to be done in those territories. It is suggested that pending proper legislation, the State Government concerned may, in the exercise of its power to remit or reduce duty, reduce the duty chargeable on such a document to the difference of duty, if any, between that actually paid on it and that chargeable on it under the local Act.

The position is not much different with regard to documents executed in a territory which was previously comprised in a Part B State and relating to a property situate in a territory which was previously comprised in a Part A State, *i.e.*, a territory to which the Indian Stamp Act applies in its entirety with its local amendments. The matter is governed by the language of the proviso to section 3 and section 19-A inserted in the main Act in various States by local amendments. Section 19-A added locally in the various States provides for the payment of difference if any in accordance with the rates in force in those States, in the case of instruments executed outside those States and brought into the said States. In Madras, section 19-A has been amended recently so as to make it applicable to an instrument executed in any part of India including a territory previously comprised in a Part B State[1]. But the Madras section as unamended is still in force

1. See Mad. Act XXV of 1957.

in a part of Andhra Pradesh State. This section had been previously adapted in 1950 specifically restricting its application to an instrument executed in a territory comprised in a Part A State or Part C State. Section 19-A inserted in Bihar, Bombay and Madhya Pradesh had been similarly adapted. Though there seems to be no specific adaptation made to section 19-A inserted in Bengal, Punjab and Uttar Pradesh, the reference to "British India" in the section has now to be read as reference to the territories which were comprised in Part A States and Part C States prior to 1st November, 1956, by virtue of clause 2 of the Adaptation of Laws Order, dated 26th January, 1950 and the States Reorganization Act. It may not be possible to read the words "British India" as "India" by reading the general adaptations made previously to the main Act into the local amendments and then applying Act XLIII of 1955 substituting the word "India" for the words "the States" in the main Act. These provisions do not seem to have been amended on the lines of Madras section 19-A. If the language of these provisions is strictly construed, the Proviso to section 3 added in the States will have the effect of making such instruments chargeable with full duty, prescribed by the Schedule of the local Acts without deduction of the duty already paid. This would be opposed to policy, and would be a great hardship. This apart, the provisions in section 18 which would have applied previously to documents executed in a Part B State is now restricted to documents executed out of India and its language cannot apply to such documents. It is therefore suggested that pending proper legislation and in order to avoid all difficulty and hardship the various State Governments may in exercise of the powers conferred by section 9 of the Act reduce with restrospective effect the duty in such cases to the difference, if any, between the duty payable under the Local Act and the duty already paid. Such a notification will be useful in Madras also regarding instruments which became chargeable under the Madras Act prior to Act XXV of 1957. But the best solution is to have a uniform provision all over India regarding this matter. It relates to collection and managment of stamp duties which is in the Concurrent List. A new section 19-A may be inserted in the main Act by the Union legislature providing for collection only of the difference in duty on an instrument executed in any part of India and stamped according to the law in force in that Part and later becoming chargeable to a higher duty under the law in force in any other part of India into which it may be brought.

In this connection reference may be made to another matter about which uniformity is desirable. At present there is variation as regards the classes of instruments which cannot be validated by payment of duty subsequent to execution (*vide* discussion at p. 235 of the M.L.J. Publication on the Indian Stamp Act, 1950 Edn.) There may be similar differences in the Acts in force in territories previously comprised in Part B States. These Acts are still in force by virtue of the Proviso to section 1 (2) of the Indian Stamp Act, 1899 inserted by Act XLIII of 1955 and section 8 of the said Act XLIII of 1955 repealing the Acts only in so far as they fixed rates of stamp duty in respect of the documents in the Union Legislative List. It is not desirable that a class of instruments should be capable of being validated on payment of duty in one part of India and not capable of being validated in another part of India. Clause (*c*) of the Proviso to section 32, Proviso (*a*) to section 35, and sections 40 and 41 may be amplified specifying by name the classes of instruments which cannot be stamped subsequently and made uniformly applicable all over India and the corresponding provisions of the local amendments got repealed. This subject is also within the field of Central Legislation because it pertains to collection and management of stamp duties and not to rates of stamp duties. The Proviso to section 1 (2) newly added may be suitably amended so as to make the Act applicable to the whole of India in regard to such matters and suitable repealing provision made in the amending Act. The Proviso may run somewhat thus :

" Provided that it shall not apply to the territories which immediately before the 1st November, 1956, were comprised in Part B States in so far as its provisions relate to rates of stamp duty in respect of documents other than those specified

in entry 91 of List I in the Seventh schedule to the Constitution, unless such provisions are extended with or without modification to such territories by the Legislature of the State concerned."

This would facilitate the evolving of a uniform Code for all India on all matters about which uniformity is desirable, with local amendments only as to rates of stamp duties on the documents in the State Legislative List, and the charging provisions as to those rates and some matters of procedure on which special local legislation is considered necessary and uniformity is not essential.

CONSTITUTIONAL PROVISIONS AS TO THE LAW OF CONTEMPT

By

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It is appropriate to examine if the inherent and statutory powers of Courts of record to punish for contempt of Court is in any way affected by the provisions of the Constitution of India.

The relevant provisions of the Constitution touching the law of contempt are Articles 19 (2), 129, 215 and 227.

Article 19 (2) provides " Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause : . . in relation to contempt of Court."

Note.—Clause (1) (*a*) refers to the Fundamental Right of Freedom of Speech and Expression.

Article 129 provides "The Supreme Court shall be a Court of record and shall have the powers of such a Court including the power to punish for contempt of itself."

Article 215 says " Every High Court shall be a Court of record and shall have the powers of such a Court including the power to punish for contempt of itself."

Article 227, runs thus " *Clause* (1).—Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction."

. . . . . .

Clause (2) (*b*).—" The High Court may make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts."

. . . . . .

Clause (4).—"Nothing in this Article shall be deemed to confer on a High Court powers of superintendence over any Court or tribunal constituted by or under any law relating to the Armed Forces."

Comments.—The words in Article 19 (2) connote that the pre-existing law of contempt do continue to operate even after the Constitution of India came into force. The question may be posited, whether under Article 19 (2) reasonable restrictions could be imposed on the existing law of contempt. It was posited in *The State* v. *Editor*[1], that 'even assuming that the Constitution makes the existing law relating to contempt of Court, subject to reasonable restrictions of the exercise of Freedom of Speech the whole law contempt of Court as it stood on the date of the coming into force of the Constitution, answers the test of reasonableness 'that' the power to punish for contempt of Court is inherent in a Court of record and this

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* Author of the *Law of Contempt of Court.*

1. A.I.R. 1955 Orissa 36 following A.I.R. 1952 S.C. 196 approving minority view of Frankfurter J. in (1941) 314 U.S. 152.

has been recognised from the earliest times in England. The High Courts in India were created Courts of records by several Letters Patent. By the Government of India Act, 1935, as well as Article 215 of the Constitution of India the Supreme Court of India and the High Courts are Courts of record and it is essential for the administration of justice and protection of individuals that the Courts should be able to punish summarily acts of contempt, because in the words of Blackstone " this power in inseparably attendant upon every superior Tribunal ".

In *Aswin Kumar* v. *Arabinda Bose*[2], the Supreme Court condemned newspapers which indulged in criticising the Supreme Court preaching to the latter not only a sermon of divine detachment from extraneous considerations such as politics and policies but also proceeded to attribute improper motives to the Judges that was clearly transgressing the limits of fair and *bona fide* criticisim and had a clear tendency of affecting the dignity and prestige of the Court, calling for action for a gross contempt under the powers recognised under Article 129. There need be no actual interference with the course of administration of justice but it is enough if the offending publication is likely or if it tends in any way to interfere with the proper administration of law. *Hiralal Dixit* v. *The State of U. P.*[3] But such an extraordinary power must, however, be sparingly used. Where public interest demands the Court will not shrink from exercising it and imposing punishment even by way of imprisonment, in cases where a mere fine may not be adquate[3].

The High Courts are declared under Article 215 to retain their inherent powers to deal with contempt of Court. Speeechs or writings misrepresentating the proceedings of the Court so as to scandalize the Court, or any publication which tends to bring into disrespute the decision of the Court and impair the faith of the public in the administration of justice are undoubtedly cases of contempt. *Mehdi* v. *Frank Moras*[4]. Where there is a clear disobedience of an injunction order of Court, proceedings for contempt is quite proper. *Ramacharan* v. *Debi Dayal Durby*[5]. Whether a particular passage amounts to contempt by scandalizing the Court is a question to be closely scrutinized. For 'justice is not a cloistered virtue' and fair criticism of the law enunciated on the severity of the sentence or fine levied do help in moulding public opinion as to the need for reform of the law[5]. Indeed it is not by stifling criticism that confidence can be created. But when once the right of fair and reasonable criticism is conceded the dignity of expression cannot be strictly insisted in every case. *H. E. H. The Nizam* v. *B. G. Kher*[6].

Under Article 215 the High Court can continue to exercise its inherent powers to proceed for contempt as a Court of record. Section 1 (2), Criminal Procedure Code, expressly excludes special jurisdictions from its scope. Hence the Code of Criminal Procedure does not apply in matters triable by the High Court. The High Court can deal with it summarily and adopt its own procedure. *Sukhdev Singh Sodhi* v. *Hon'ble J. S. Teja Singh*[7]. All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself[7].

As the High Courts are not functioning under the Criminal Procedure Code but act in their special jurisdiction, the Supreme Court has no power under section 527, Criminal Procedure Code, to transfer such proceedings from the High Court to another[7]. The power to punish is stated in Article 215 and as this is not a fundamental right, Article 32 can have no application. In the same case[7], there is a very useful obiter which posits " It is desirable on general principles of justice that a Judge who has been personally attacked should not as far as possible hear a contempt matter which to that extent, concerns him personally. The judges should bear in mind the oft-quoted maxim that justice must not only be done but must be seen to be done by all concerned and most particularly by an accused person who

2. (1953) S.C.J. 18 : A.I.R. 1953 S.C. 75.
3. A.I.R. 1954 S.C. 743 : 1954 S.C.J. 846.
4. A.I.R. 1954 Assam 201 (F.B.).
5. A.I.R. 1955 All. 483.
6. A.I.R. 1955 Hyd. 264.
7. A.I.R. 1954 S.C. 186 : 1954 S.C.J. 67.

should always be given as far as that is humanly possible, a feeling of confidence that he will receive a fair, just and impartial trial by judges who have no personal interest or concern in his case."

It will be seen that Article 215 vests in the High Court all the powers of a Court of Record including "the power to punish the contempt of itself". The latter phrase does not limit such powers of the High Court as it possesses as a Court of record or other powers with which it may be invested by law[7]. The power to commit for contempt of subordinate Courts has been expressly conferred by the Contempt of Courts Act. *Lakhan Singh* v. *Balbir Singh*[8] Hypersensitive use of the jurisdiction in contempt is not conducive to the achievement of the purpose for which it exists. Its effectiveness depends to a very great extent on the caution, wisdom and restraint with which it is used. *Mehdi* v. *Frank Mores*[9].

Where a Judge of the High Court is appointed the sole member of an industrial tribunal, he cannot claim to exercise the powers of a High Court Judge to punish persons for contempt of the Tribunal under Article 215. In re *Hayles, the Editor of "The Madras Mail"*[10]. For it is only contempt of the Tribunal and not contempt of the High Court.

The High Court has powers of superintendence over all subordinate Courts, inclusive of Special Tribunals. *Muhomed Raoof* v. *State*[11]. This power is also to be sparingly used and only in appropriate cases with a view to keep the subordinate Courts or tribunals within the bounds of authority, to see that they do what their duty enjoins and that they do it in a legal manner. *Tirath Singh* v. *Bachitor Singh*[12].

In its ultimate analysis contempt of Court is contempt of the authority of the sovereign State exercised through its Courts duly constituted for the administration of justice. It is open to Parliament of India which exercises the sovereign authority of the State over this portion of the legislative field to provide specifically for the exercise of the power of the sovereign State to punish contempts of any specified classes of Courts or Tribunals. Thus in the case of industrial Tribunals the State acting through Parliament has conferred power on the Industrial Tribunal and on the Labour Appellate Tribunal by section 30 of Act XLVIII of 1950 in respect of categories of contempt enumerated in sub-sections (1) and (2) of section 30. In this event the High Court should respect this statutory provision and not invoke its own inherent powers in this regard. While Article 227 which replaced section 15 of the High Courts Act, 1861, extended the power of superintendence of the High Court to tribunals also, Article 227 did not of itself vest in the High Court the power to punish contempt of subordinate Courts or tribunals. But the inherent power of the High Court to take action against contempt of subordinate Courts is left untouched by Article 227 even as section 15 of the High Courts Act left it untouched.

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8. A.I.R. 1953 All. 342 (D.B.).
9. A.I.R. 1954 Assam 201 (F.B.).
10. (1955) 1 M.L.J. 375.
11. A.I.R. 1951 Hyd. 50 (F.B.).
12. A.I.R. 1954 Pepsu 118.

BOOK REVIEWS.

CENTRAL SALES TAX ACT—We have received the following publications on the recent Central Sales Tax Legislation :

(1) CENTRAL SALES TAX ACT, 1956, WITH COMMENTARIES, RULES AND NOTIFICATIONS by *B. L. Dalmia*, B.COM., LL.B., Advocate, High Court. (Published in four parts by Law Chamber, Law Book Publishers, 134, Mahatma Gandhi Road, Calcutta. Price Rs. 3.50 nP. per part.

(2) COMMENTARY ON THE CENTRAL SALES TAX ACT WITH RULES AND NOTIFICATIONS by *A.G. Roy*, M.A., B.L., Advocate and Assistant Editor, Patna Law Reporter. Published by Pahuja Bros., Law-Book Sellers and Publishers, Patna-3. Price Rs. 5.75 nP.

(3) CENTRAL SALES TAX ACT, 1956, by *R. V. Patel*. Published by M/s. N. M. Tripathi (Private) Ltd., Bombay-2. Price Rs. 12.

The recent Legislation of the Union Parliament on the subject of Sales Tax is intended to set at rest the great confusion and controversy that has been prevailing on the levy of Sales Tax by States on extra territorial sales. But this enactment in itself has raised several other controversies which have to be resolved in course of time. The Legislation is a taxation measure and the nature of the tax levy is such that it affects a vast number of members of the public both in the sphere of Commerce and outside it. No wonder therefore that a number of publications on this piece of Legislation has come into the market. All of them would be found very much in need. The publication by B. L. Dalmia is in four handy small parts. The notes are given under each section with reference to case-law as decided under several State Legislations on the subject in previous years. Part I consists of the Act with notes and Part II consists the rules framed by the Centre and the different States. Part III contains a list of exempted goods in several States and Part IV deals with the rates of Sales Tax. The get-up and the printing of the book is very good.

CENTRAL SALES TAX ACT, 1956, by *R. V. Patel*, is similar in nature with the Act and Rules. The commentaries on the main Act are analytical and exhaustive with an introductory chapter on the historical back ground and the scope of the Legislation.

The above three publications which have come out in the market are all quite useful. The problem of levy of sales-tax on inter-State trade has been brought to some uniformity by this Legislation. The actual administration of the Act however is left to the States and each of them have framed Rules in this regard. A comparative study of these would be of great assistance in solving the problems that would arise in the administration of the Act. We recommend the Publications for use by Assessees, Lawyers and the Department.

INJUNCTIONS AGAINST ULTRA VIRES ACTS OF COMPANIES

By

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A company is an incorporated individual with limited powers. The powers of a company are such and such only as the objects stated in its memorandum confer[1]. A company may, however, do all such acts which are either essential or reasonably and fairly incidental to the attainment of its objects[2]. But whatever is done by a company in excess of its corporate powers as defined by the memorandum, is treated by law as though it was not done at all[3]. It is said to be *ultra vires* of the company. In other words, memorandum determines the scope of powers and the doctrine of *ultra vires* makes any act outside that scope as unlawful and void. Nevertheless companies have exhibited a universal tendency to escape from the prison in which the doctrine of *ultra vires* confines them. Hence very frequently *ultra vires* acts are committed. It is proposed here to examine the rights of members and creditors to restrain a company from committing *ultra vires* acts.

RIGHT OF MEMBERS.

That members are entitled to hold a registered company to its registered objects has been recognized long since[4]. Nothing is more desirable in the public interest as well as for the protection of members and creditors that activities of a company must be confined to such matters and things as are necessary to enable it to discharge the duties for which it has been incorporated. Hence the Courts will restrain incorporated bodies within the limits of their institution and an action for an injunction having that object will lie at the suit of one of the members.

The rights of a member to restrain a company from doing *ultra vires* acts was reaffirmed in *Jenkins* v. *Pharmaceutical Society of Great Britain*[5]. The defendant society was incorporated by Royal Charter in 1843 for the purpose of advancing chemistry and pharmacy and promoting a uniform system of education of those who should practise the same and also for the protection of those who carried on the business of chemists and druggists. The society undertook certain acts all of which would in effect convert the society into a Trade Union, a result which could not have been contemplated in 1843 when the charter was granted. Hence the acts were *ultra vires* of the society. The plaintiff, a registered member of the society, sued the society for an injunction. Peterson, J., held:

"In my opinion authorities[6] justify me in holding that if the society in the present case intends to do acts which are not authorized by its charter, a

1. Thomas v. Railroad Co., 101 U.S. 71.

2. A. G. v. Great Eastern Rly., Co., (1880) L.R. 5 A.C. 473.

3. The doctrine of *ultra vires* was explained by Lord Chancellor Cairns in *Ashbury Etc., Co.* v. *Riche*, L.R. 7 H.L. 653 at 699. He said : "The subscribers are to state the object for which the proposed company is to be established and that the existence, the coming into existence of the company, is to be an existence and to be a coming into existence for those objects and for those objects only."

4. *Attorney-General* v. *Great Eastern Rly., Co.*, 1879 L.R. 11 Ch. Div. 449, 503, per Lord Bramwell: "The public are entitled to hold a registered company to its registered business.". But that was said in reference to a public corporation, for, in case of a company registered under the Companies Acts only members are entitled to an injunction against *ultra vires* acts, and not the public.

5. L.R. (1921) 1 Ch. 392.

6. Following authorities were reviewed : *Ward* v. *Society of Attorneys*, 1 Coll. 370. *Bready* v. *Royal British Nurses' Association*, (1897) 2 Ch. 272. *Rendall* v. *Crystal Palace Co.*, 4 K. & J. 326.

member is entitled to ask for an injunction restraining the commission of acts which are outside the scope of the charter and which may result in forfeiture of the charter and the destruction of the society."

The foundation of the right is that the members join in a company on the faith that it shall not travel beyond the field of its corporate action. But before a member can exercise this right he must satisfy the following conditions.

Firstly, the plaintiff should be a registered member of the company. Whether persons having only equitable interest in shares, but not being registered shareholders, can sue to restrain a company from doing an *ultra vires* act, has not been decided. But, on principle, it appears that such a right need not be extended to them, for their interest in the company is not sufficient to warrant this important right of injunction.

Secondly, "a shareholder in a company who seeks to restrain the company from doing an *ultra vires* act must show by distinct and definite averments, the illegality of the act"[7]. Unless the act is shown to be distinctly *ultra vires*, the Court shall not listen to the plaintiff.

Thirdly, the plaintiff must sue the company in his proper capacity and interest as a shareholder[8] and he must not suffer from any personal disqualification. It is by no means clear what is meant by 'personal disqualification', but on that ground alone injunction was refused in the following two cases. One is *Forrest* v. *Manchester, etc., Rly. Co.*[9] The plaintiff filed a bill for injunction against the defendant company. The bill alleged that the company was running excursion boats to a place which was beyond the limits prescribed by its Act. Such excursion boats were prejudicial to the interest of a packet company in which the plaintiff was a large shareholder. He had no sympathy whatever with the interest of the defendant company. Protection of the packet company was his only motive for instituting the suit and he admitted that he was directed to institute the suit by the directors of the packet company who promised to indemnify him against costs. The Lord Chancellor did not even consider whether the acts impugned were within or beyond the powers of the company. He refused injunction on the simple ground of personal disqualification. The right to apply for an injunction is given to members for the protection of the company's interests. Every member must, therefore, exercise it *bona fide* for the benefit of the company. Was this suit filed *bona fide* for the benefit of the company? Far from that. The plaintiff was a puppet of the packet company.

The second case is that of *Robson* v. *Dodds*[10]. One Harle had a quarrel of several years standing with the directors of a society and he wanted to turn them out of the society. He, therefore, persuaded the plaintiff to purchase one share in the society and then got him to institute the suit against the directors to restrain them from borrowing money on behalf of the society on the ground that such borrowings were *ultra vires*. Malins V. C., said[11]:

"It (the suit) appears to be instituted.......... to wreak out the feelings of personal vengeance and anger............ The plaintiff is a mere puppet.

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7. *Mills* v. *Northern Rly. of Buenos Ayres Co.*, (1870) L.R. 5 Ch. 621.
8. Pollock on Contracts, 12th Ed., page 554.
9. (1861) 4 D.L.J. 126 : 45 E.R. 554.
10. (1869) 8 Eq. 301.
11. *Ibid.*, at p. 307.

in the hands of Harle. This suit is not a *bona fide* one, faithfully, truthfully and sincerely directed to the interest of shareholders."

Hence the injunction was refused.

But if the plaintiff has any real interest and is proceeding at his own risk, he is not disqualified from suing by the fact that he has collateral motives, or is acting on the suggestion of strangers or enemies of the company, or even has acquired his interest for the very purpose of instituting the suit. In *Colman* v. *Eastern Rly. Co.*[12], the directors, for the purpose of increasing the traffic, proposed to do certain acts which, the Court found, were not within the powers of the company. The plaintiff filed a bill for injunction. It appeared that he was suing at the instigation of another rival company. *Held*, that this circumstance was not itself, sufficient to prevent him from obtaining an injunction on the merits of his case. Similarly in *Bloxam* v. *Metropolitan Rly. Co.*[13], the plaintiff bought his shares a short time before he filed a bill for an injunction. He bought the shares for the very purpose of instituting the suit. Lord Chelmsford, L.C., held that he was not prevented from obtaining an injunction. The question in all cases is:

"Is the suit *bona fide* the plaintiff's own suit, or is he merely the hand by which some one else acts?"

If he has real interest and acts *bona fide* there is nothing to prevent him from getting an injunction.

If the plaintiff satisfies these conditions the small interest of the plaintiff will be no objection to his suit as the suit is always filed on behalf of himself and all other shareholders.[14] But it is not always necessary that the plaintiff should sue on behalf of himself and all other shareholders of the company. In *Hoole* v. *Great Western Rly., Co.*[15], the company had drawn a scheme for the issue of shares in lieu of dividends. A shareholder filed his bill on behalf of himself and that class of the shareholders to which he belonged. It was held that the scheme was *ultra vires* and that an individual member of a corporation may maintain a suit in his own name without suing on behalf of other persons to restrain the corporation from doing an act which is *ultra vires* of the corporation.

THE RIGHT OF CREDITORS.

Are the creditors of a company entitled to restrain it from doing an *ultra vires* act? There are two leading cases on the point. One is *Mills* v. *Northern Rly. Co.*[16], of Buenos Ayres and the other *Lawrence* v. *West Somerset Mineral Rly. Co.*[17]. In both these cases it has been held that a simple contract creditor cannot get an injunction to restrain the company from dealing with their assets as they please on the ground that they are diminishing the sums for the payment of his debt or on the ground that such acts are *ultra vires* of the company. A similar statement of law appears in Halsbury's Laws of England[18].

This state of law is hardly satisfactory. *Ultra vires* doctrine was one consequence of the introduction of limited liability. The true purpose of the doctrine was to maintain the capital of the company for the benefit not only of

12. 76 R.R. 78.
13. (1868) L.R. 3 Ch. 337.
14. *Seaton* v. *Grant*, L.R. (1867) 2 Ch. App. 459, where it was held that small interest of the plaintiff was no defence.
15. (1867) L.R. 3 Ch. 262.
16. (1870) L.R. 5 Ch. 621.
17. (1918) L.R. 2 Ch. 250.
18. Third Ed., Vol. 6, p. 307.

the shareholders but also of the creditors. This is quite clear from the words of Lord Cairns, L.C., in *Ashbury's case*[19].

"The provisions under which that system of limited liability was inaugurated, were provisions not merely........ for the benefit of the shareholders .... but were enactments intended also to provide for the interest .... of those who might be creditors of companies of this kind."

The doctrine of *ultra vires*, therefore, enures for the benefit of both the members and creditors, and it is out of tune with the very purpose of the doctrine that if an *ultra vires* act is threatened, the members can, but the creditors cannot, get an injunction.

The rule that creditors are not entitled to injunctions has, however, been sought to be justified on some grounds which are hardly adequate. Firstly, if the directors disburse the corporate capital for non-corporate purposes, they are personally liable to replace it at the action of the shareholders or liquidator. This, it is suggested[20], preserves the capital of the company and makes it available for the payment of creditors. But this hardly seems to do justice to creditors in those cases in which the directors waste the corporate assets with the acquiescence of the shareholders. Even as members join a company on the faith of its objects so also creditors extend credit on the strength of the company's objects. And if a company deviates from its objects the creditors should be as much entitled to an injunction as members are.

The second suggested justification is that a creditor has got the ordinary remedy of obtaining the judgment against the company and to take out his execution and also, if the case warrants, of applying to wind up the company[21]. This affords no relief in those cases in which the creditor's loan is not immediately due so that he can neither take up an action for recovery nor present a petition for winding up. The creditors of a limited company give credit not to the shareholders but to the assets of the company. It would, therefore, be unreasonable if they could not restrain the wasting of those assets.

A third suggested justification is that such an action is wholly unprecedented, and, if permitted, the Courts "would be called upon to interfere with the concerns of almost every company against which a creditor might suppose that he had demands"[22] The creditor, however, does not want to interfere with the company's affairs. He sues the company to restrain it from doing certain acts which the company has no power to do and which are, indeed, prohibited. Moreover, he will always have to discharge the heavy burden of proof.

Hence, it is not necessary in India to follow English cases on the point.

RIGHT OF PUBLIC.

The law was stated by Cozens-Hardy, L.J., in *Towers* v. *African Tug Co.*[23]:

"............ although it has long been established that such an action may be maintained by a shareholder suing on behalf of himself and all other shareholders against the company, the plaintiff in an action so framed must be a person who is really interested. The action cannot be maintained by a common informer, nor by a person who happens to be within the possibility of injury."

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19. In *Ashbury Carriage Co.* v. *Riche*, (1875) L.R. 7 H.L. 653 at 667.
20. Halsbury's Laws of England, Third Ed., Vol. 6, p. 307.
21. Lord Hatherley, L.C., in *Mills* v. *Northern Rly. of Buenos Ayres*, (1870) L.R. 5 Ch. 621 at 628.
22. Lord Hatherley in *Mills' Case*, at p. 628.
23. L.R. (1904) 1 Ch. 558, 571.

INDUSTRIAL RELATIONS IN INDIA

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The modern complex industrial relations in industrial countries stand in sharp contrast to the simple arrangement in the past which governed the relations between the owner and his workers. In the early period, as elsewhere, in India labour was regarded as a commodity subject to the general laws of supply and demand. Workers were mostly subject to the autocratic powers of the management which was callous of their welfare that resulted in ruthless exploitation and oppression. The situation was further aggravated because workers lacked unity which was the only guarantee for better working conditions and higher standard of living. The employers lost sight of all these considerations which was the prerequisite of industrial progress, peace and good relations. It created an antagonism, a conflict of interest between the employers and the workers which gave rise to the problem of industrial relations of devising ways and means of harmonising this conflict of interest. Thus, industrial relations system of a country is determined primarily by various forces economic, political and social aptitudes of the people. Secondly, it is to be found in the system of Government, the stage of industrial development of a country and lastly upon vigorous healthy trade unions.

Before giving an appraisal of present industrial relations in India, the study of it within the framework of the Constitution will be useful in this context.

CONSTITUTIONAL BACKGROUND.

In the same year as the I.L.O. was set up (1919), the country received its Constitution under Montague-Chelmsford reforms. This Constitution conferred a modified degree of autonomy on the provinces. So far as labour was concerned the Central Legislature was given powers to legislate on all labour matters with the exception on housing, and also, with the approval of the Central Government and the overriding authority of the Central Legislature, on all other labour subject except mining.

GOVERNMENT OF INDIA ACT, 1935.

There was a distribution between provincial and Central functions regarding legislation as well as administration. While the regulation of labour and safety

in mines and oilfields, on federal railways and major ports and inter-provincial migration were the subject for federal legislation[1], the following were the subjects of concurrent legislative jurisdiction[2]: factories; welfare of labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance including invalidity pensions; trade unions; industrial and labour disputes. The concurrent powers[3] were subject to the overriding jurisdiction of the Central Legislature.

New Constitution of India.

The concept of Indian Federation involved a decision as to what subjects should be matters for the Union Parliament to deal with and what might safely be entrusted to the legislatures of the individual States. It was found, as under the Government of India Act, 1935, that there were several matters which could not, in practice, be so rigidly circumscribed, in other words, there were subjects upon which both the Union and the States might usefully legislate.

Legislative Powers of The Union.

Like the Government of India Act, 1935, the new Constitution of India which came into force on 26th January, 1950, retains the same division of powers between the Union and the States. Chapter I of Part XI of the Constitution expressly deals with the legislative relations between Union and the several States comprised in it, as also the distribution of legislative powers between them. There are appended a number of Schedules which are to be regarded as the integral parts of the Constitution. In the Seventh Schedule are to be found three lists which depend for their contents upon the provision appearing in Chapter I of Part XI of the Constitution. List I, styled the Union list, consists of 97 items, and for our purpose the order in which they appear is as follows:[4] atomic energy and mineral resources necessary for its production; railways; maritime shipping and navigation, including shipping and navigation on tidal waters; industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest; regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; and other liquids and substances declared by Parliament by law to be dangerously inflammable; regulations of mines and mineral development under the control of the Union is declared by Parliament by law to be expedient in the public interest; regulation of labour and safety in mines and oilfields; regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest; industrial disputes concerning Union employees.

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1. List I, Seventh Schedule, Govt. of India Act, 1935, items 35, 36, 20, 22 and 50.
2. List III, Seventh Schedule, Govt. of India Act, 1935, items 26, 27, 28 and 29.
3. S. 107 (1), Govt. of India Act, 1935.
4. Constitution of India, Seventh Schedule, items 6, 22, 25, 52, 53, 54, 55 and 61.

OF STATES.

List II, enumerates the following entries, namely[5] :—

Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union; industries subject to the provisions of Entry 52 of List I; gas and gas work.

In List III, styled the Concurrent List, we must notice some six entries[6], namely;

Trade unions; industrial and labour disputes; social security and social insurance, employment and unemployment; welfare of labour including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits; factories; boilers; electricity.

Similar to 1919 and 1935 Constitutions, it is provided that when the provisions of an Act[7], passed by the Union conflicts with those of an Act passed by a State, the former prevails over the latter.

Further the study of industrial relations acquires greater significance in the context of the preamble of the Constitution of India, which aims at securing for all its citizens—

"Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among all.

Fraternity assuring the dignity of the individual and Unity of the Nation."

In its Directive Principles of State Policy[8], it is stated that:

"The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life."

The Constitution further provides certain principles of policy to be followed by the State securing[9]—

(*a*) that the citizens, men and women equally have the right to an adequate means of livelihood;

(*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(*d*) that there is equal pay for equal work for both men and women;

(*e*) that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(*f*) that childhood and youth are protected against exploitation and against moral and material abandonment.

5. Constitution of India, Seventh Schedule, items 23, 24 and 25.
6. *Ibid*, items 22, 23, 24, 36, 37 and 38.
7. Art. 254 (*i*), Constitution of India.
8. Art. 38, *ibid.*
9. Art. 39, *ibid.*

These basic and general principles were given a more precise direction when Parliament accepted in December, 1954, the socialist pattern of society as the objective of social and economic policy which as other policies, must therefore be governed by these principles and directions.

INTERNATIONAL LABOUR ORGANISATION AND THE LABOUR LEGISLATION IN INDIA.

The various International Labour Organisation Conventions broadly represent the world opinion on the subject reached after full careful discussions by all parties concerned—Governments, employers and workers. The influence of international labour conventions have been a very significant factor in shaping the course of industrial legislation in India. Labour legislation prior to 1919 was rudimentary relating to factories, mines and migration. The provisions of these laws constituted the minimum interference with the working conditions of labour and the relationship between the labour and the employer. In contrast, after the establishment of I.L.O. labour legislation in India made great strides as a result of the influence of international labour conventions. The principal enactments relate to such topics as protection, safety, sanitation, welfare, health, working hours, working conditions, minimum wages, fair wages, minimum age for children, nightwork of women, housing, old age pension, protection against accidents, weekly holidays, workmen's compensation, social security and insurance to employees in case of sickness, maternity and employment injury and provident fund, trade union and industrial disputes, etc. The Royal Commission on labour in India was set up in 1929 and its report is considered the *magna carta* of labour in India. The Commission too had recommended that great weight should be attached to international labour conventions. For good industrial relations in the industry the Commission proposed the establishment of industrial Councils on tripartite model of International Labour Conference. Accordingly in 1942 the Ministry of Labour established the Indian Labour Conference which meets annually and is almost exactly on the tripartite pattern of International Labour Conference. It examines all the measures of proposed labour legislation.

More recently, however, the Government decided that there should be a regular and detailed examination of international labour conventions and recommendations on a continuing basis. A Tripartite Committee, called the Committee on I.L.O. Conventions, was therefore set up with a view to accelerating their process of implementation of international labour conventions. The Committee meets twice a year and makes a detailed examination of a selected list of conventions and recommendations. Out of 104 I.L.O. conventions covering world wide labour problems, India's actual record of ratification is 21 conventions, though appearing at the first glance not very impressive, but this is because some of them are not relevant to conditions that prevail in India.

INDUSTRIAL RELATIONS BEFORE 1947.

The condition of the industrial worker in the pre-independence era in India was more appalling than that of his counterpart in the West. The Indian industrial worker was in receipt of wages which were insufficient to satisfy even the primary needs of civilised existence. There was no permanent industrial population on large scale. Unscrupulous individuals did not hesitate to fleece the labourer from beginning to end. The housing conditions were far from satisfactory. There was no provision for cleanliness and sanitation or for normal domestic life. There

were very few agencies conducting social welfare work among them, planning their leisure and making suitable arrangements for the health, education and recreation for their children. The hours of work and wages were deplorable when compared with the Western countries. Even children were made to work 30 hours per week. Social insurance schemes were almost non-existent. Even if law provided maternity benefit, employers frequently resorted to unfair means in depriving expectant mothers of what was due to them. The bargaining capacity was not equal to that of employer, with the result the former was often obliged to make a forced agreement. Up to 1926 Trade Unions were liable to prosecution and only in that year the law recognised their existence. Since the end of the First World War labour had been organising itself and conducting several strikes some of which had been wholly or partially successful. But the Trade Disputes Act, 1929 penalised sympathetic strikes and those designed to coerce the Government. It forbade the transference of money from one Union to another and the cessation from work of those engaged in public utility service unless 14 days notice was given in writing, Labour was disunited, and consequently there was no possibility of collective bargaining. The relations between the employers and the employees were one of antagonism, opposition and intolerance. The Indian Trade Unions Act, 1926 though it had given legal and corporate status to Trade Unions and immunity[10], to their officers and members against civil and criminal actions, imposed no obligation on the employers to recognise and deal with registered Trade Unions. The Royal Commission on Labour in 1931 had strongly recommended in favour of recognition of trade unions, which meant the right of the Union to negotiate with the employer in respect of matters affecting either the common or the individual interests of its members. Throughout the thirties recognition was a recurring cause of friction between employers and the organised labour. In order to help the war, effort, several emergency measures were adopted by the Central Government concerning industrial disputes during the War. By rule 81-A of Defence of India Rules strikes and lock-outs were prohibited and compulsory arbitration was devised which left no option to the trade unions to exercise their right of self help, their right of direct action, and of collective bargaining. The Governmental attitude regarding industrial relations was neither one of opposition nor of encouragement, but primarily of maintaining industrial peace regardless of labour demands and aspirations.

LABOUR RELATIONS AFTER 1947.

It was evident in the post-independence era that the *sine qua non* of industrial harmony was collective bargaining wherein the employers and employees bargain on equal terms. But collective bargaining was an impossibility in the face of strong opposition from the employers along with the totally unorganised labour unions or multiplicity of such trade unions. Therefore in this transitional period, labour management relations had to be revolutionalised according to the changing needs of society. As a consequence of the political changes, national leaders sought and discovered a new economic policy, conveniently termed as " mixed economy " as suitable basis for industrial development of the country. At the Industries Conference held in December, 1947, the resolution on industrial truce was adopted. The Conference was of the view[11] that " the increase in the industrial production

10. Ss. 17 and 18, the Indian Trade Unions Act, 1926.

11. *See* Summary of Proceedings of the Sixth Labour Ministers' Conference, 1948 at page 30.

which is so vital to the economy of the Country cannot be achieved without the fullest co-operation between labour and management and stable and friendly relations between them. The employer must recognise the proper role of labour in industry and the need to secure for labour, fair wages and working conditions; labour for its part must give equal recognition to its duty in contributing to the increase of national income without which a permanent rise in the general standard of living cannot be achieved". The Industrial Truce Resolution[12], *inter alia* provided : "(*a*) steps to be taken for the distribution of profits meeting the fair demands of labour; (*b*) establishment of machinery—central regional and functional for the study and determination of fair wages and conditions of labour ; and fair remuneration for capital ; and the methods for the association of labour in all matters concerning industrial production, such as formation of Central, Regional and Unit Production Committees ; (*c*) the constitution in each industrial undertaking of Works Committees representating management and duly elected representatives of labour for the settlement of disputes which may arise from day to day. . . . . " These having been accepted the Conference called upon labour and management to agree to maintain industrial peace and to avert lock-outs, strikes or slowing down of production during the next three years.

In April, 1948, the Government of India enunciated a clear statement on industrial policy which indicated India's bent towards the socialistic pattern and which committed her to a number of public enterprises. The Resolution on Industrial policy[13] para. 9 is of special significance in this context. Amongst other things the resolution states: " . . . . The system of remuneration to capital as well as labour must be so devised that, while in the interest of consumers and primary producers, excessive profits should be prevented by suitable methods of taxation and otherwise, both will share the product of their effort, after making provisions for payment of fair wages to labour, a fair return on capital employed in the industry. . . " Government of India, in addition proposed to overhaul regulation of Industry by the State, proposed to establish machinery for advising on fair wages, fair remuneration for capital and conditions of labour. It further envisaged to associate labour in all matters concerning industrial production in all levels. Further more in case of unresolved conflicts between management and labour industrial relation machinery was to be established for dealing with major disputes.

Consequently, to promote healthy employer-employee relations, round about fifties we find on the statute book many enactments in this regard. Some of these important measures are the—Industrial Employment (Standing Orders) Act, 1946 requiring the employers in industrial establishment to define with sufficient precision the conditions of employment under them and to make the said conditions known to the workmen so employed; the Industrial Disputes Act, 1947 for providing suitable machinery for the satisfactory settlement of disputes ; now the repealed Industrial Disputes (Appellate Tribunal) Act, 1950, which established an Appellate Tribunal in relation to industrial disputes to hear appeals against the awards and decisions of Industrial Tribunals ; the Indian Trade Unions (Amendment) Act, 1947 regarding compulsory recognition by employers of representative of Trade Unions ; the Minimum Wages Act, 1948, establishing statutory wages—fixing

12. *See* Summary of Proceedings of the Sixth Labour Ministers' Conference, 1948 at page 30.
13. *Ibid*, 31.

machinery; and the Employees' State Insurance Act, 1948 for an integrated scheme of insurance against sickness, maternity and employment injury, etc. Besides these measures, the State Governments taking full advantage of their concurrent powers in respect of labour, had also enacted supplementary legislation dealing with their own labour problems and had aligned themselves with the Government of India in the matter of progressive labour legislation.

Since 1950 India has been gradually moving ahead on the "socialistic pattern" of society where the principal means of production are under social ownership or control. This is in pursuance of the objectives stated in the Preamble and the Directive Principles of State Policy of the Constitution of India. The socialistic ideal aims at the elimination of class conflicts and securing for every body his due. In its perfect form it should admit of no exp oitation by the producers of the consumers and labourers. In fact this is the paramount justification for a public enterprise. Accordingly due stress has been laid on the good of labourers in determining the proper contours of management. The First Five Year Plan envisaged that labour problems should be approached from two angles[14]: the welfare of the working class and the country's economic stability and progress. It maintained that besides the satisfaction of the basic needs for food, clothing and shelter; a worker should enjoy improved health service, wider provisions of social security, better educational opportunities and increased recreational and cultural facilities. He should have freedom to organise and adopt lawful means to promote his rights and interest and if, necessary to have access to impartial machinery for the settlement of industrial disputes. The Second Five Year Plan adopts the Avadi Resolution on economic policy which refers in these words :

" The achievement of a socialist pattern of society has been accepted as the objective of the economic policy. This means that basic criterion for determining the advance is not private profits but social gain......"

The socialist pattern of society without a labourer getting his due would be contrary to the very fundamentals of socialism. Industrial policy, as other policies, must therefore be governed by these principles and directions. The Industrial Policy Resolution 1956[15], besides the programme of industrial development aims at proper amenities and incentives for all those engaged in industry. It declares "The maintenance of industrial peace is one of the prime requisites of industrial progress. In a socialist democracy labour is a partner in the common task of industrial development and should participate in it with enthusiasm. ......There should be joint consultation and workers and technicians, should whereever possible, be associated progressively in management." Accordingly in India to achieve these objects methods have been devised either by legislation or by co-operation between industry and government. Labour relation enactments have been passed and the idea in public of trade unionism and collective bargaining[16], is steadily increasing. The Constitution has given a death blow[17] to the old policy of negation of workers' freedom to combine and act for their mutual protection.

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14. International Labour Review, 1954, 194.
15. Programmes of Industrial Development 1956-61, 434.
16. *See* The Indian Trade Unions (Amendment) Act, 1947 and Labour Relations Act, 1950.
17. Art. 19 (1) (*c*), Constitution of India.

Consequently we find in all recent labour legislation, the industrial relations are being so arranged which aim at economic security and fair wages for the labour. The State in public undertakings has become a model employer. For happy labour management relation Works Committees have been established consisting of the representatives of employers and employees to settle difference in the day to day administration. As regards protection against economic consequences and old age, the Employees' Provident Fund Act, 1952 is gradually being enforced in different States of India. Employees' State Insurance Act, 1948 as amended in 1951 have been made applicable *inter alia* to employees working in factories in Delhi, Kanpur and Calcutta, etc., and the workers are entitled to benefits of sickness, maternity and employment injuries. The Industrial Disputes Act has been amended so as to prohibit appearance of lawyers[18] in the original and appellate Tribunals. The Labour Disputes (Appellate Tribunal) Act, 1950 establishing the Labour Appellate Tribunal to hear appeals from awards or decisions of Industrial Tribunals has been abolished by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956. The main consideration for the abolition of Appellate Tribunals was its tardy proceedings with legal technicalities, formalities and appeals. At the Nainital Conference, 1952 the representatives of labour had demanded its abolition but the employers did not agree. In 1956 the necessity for fair settlement of disputes, without waste of time and money became imperative and the Government of India decided to abolish the Industrial Disputes (Appellate) Tribunals. Under the Fair Wages Act, 1951, wage boards have been set up in several industries. The Fair Wages Committee had recommended a general wage increase with regard to living wages for workers. Wage levels in most of the industries have been far below the living wages and unless prompt steps were taken to raise them, it was difficult to attain a high level of productivity, so necessary for the country's economic growth and happy management of labour relations essential for industrial peace. The management have been complaining of a low labour productivity while over-all production of the country has been going up. Labour productivity can not increase much, unless there is a contented labour force which means as a first step a living wage. The Planning Commission has recognised the need of a Wage Commission for the country and the Union Labour Ministry has set up wage boards for various industries so that any wage structure for the plan period should be such that it is rational, practical and realistic and workers would not have always to quarrel and fight with employers and management in getting an enhancement of their wages. In view of this consideration, by the Working Journalists (Industrial Disputes) Act, 1955 the working journalists are entitled to the benefits of the procedure for settlement of disputes envisaged in the Industrial Disputes Act, 1947 which formerly did not apply to working journalists.

Rationalisation or reduction in job requirements in industry contemplated by the Plan also presents a very grave problem for industrial harmony. While rationalisation is essentially necessary with a view to improve production and to reduce costs, yet there cannot be rationalisation which does not entail partial retrenchment of labour personnel. The Kanpur Textile Mills Rationalisation Committee[19] in its interim report in 1956 has held that "immediately there can be no extension of rationalisation or reduction in job requirements owing to certain deficiencies in

18. S. 36 (3), Industrial Disputes Act, 1947.
19. See *National Herald*, December 3, 1956.

physical working conditions and defects in machines. The time in which rationalisation can be introduced depends upon the pace at which the mills bring about the prescribed physical, machanical and operative working conditions." Though the Committee recommended strongly that vacancies caused by death, resignation, retirement and abandonment to be set off against labour thrown out of job, but the alternative occupations may not be readily available. This has the effect of making rationalisation almost always a fruitful source of labour disputes.

Lastly, the recent controversial problem affecting body politic in general and industrial policy in particular, has arisen due to joint stock companies contribution of funds to the political party or parties which will advance policies conducive to the interest of the Company. This incidental question came up first before P.B. Mukerji, J., of the Calcutta High Court[20], who remarked "to induce the government of the day by contributing money to the political funds of political parties, is to adopt the most sinister principle fraught with grave dangers to the commercial as well as public standards of administration." It further added that:

"To convert convictions and conscience by money is to prevent both democracy and administration." Chagla, C.J., observed in almost identical way. His Lordship said:[21] "It is with considerable uneasiness and a sinking feeling in the heart that we approached this appeal and proposals of the Tata Iron and Steel Co., Ltd., that they should be permitted by an amendment of their memorandum of association to make contributions to political parties. Democracy in this country is nascent and it is necessary that democracy should be looked after, tended and nurtured so that it should rise to full and proper stature. Therefore any proposal or suggestion which is likely to strangle that democracy almost in its cradle must be looked at not only with considerable hesitation but with a great deal of suspicion." As a matter of fact the part played by industrial concerns and industrialists in social evolution is a dismal chapter in history. For a socialistic pattern of society nay for industrial democracy such manoeuvre by trading companies is to keep complete control over the means of production and distribution is full of grave dangers. It is a danger which might grow apace and which might ultimately overwhelm democracy in this country Parliament should therefore intervene prohibiting such activities for keeping "the springs of democracy and administration reasonably pure and unsullied." For it has been observed by Laski "Classes excluded from a share in power have also been "classes excluded from a share in power have also been classes excluded from a share in benefits". The industrialpeace and harmony will be a myth if such corrupt practices go unchecked. If this goes so and the political leaders become dummy under the influence of "big money" it will be a great disaster to the principles and philosophy for which India stands.

Co-operation and Co-ordination between Labour and Management.

The most important factor in shaping the course of industrial relations has unquestionably been the extent of co-operation at various levels between labour and management which in itself largely depends upon healthy trade unionism and the attitude of the State. In India the trend of Indian labour policy has been to promote harmonious industrial relations through tripartite discussions and thereby to bring

20. In Re *Indian Iron & Steel Co., Ltd.*, 61 C.W.N. 377.
21. *Jayanti Lal v. Tata Iron & Steel Co., Ltd.*, (1957) 69 Bom. L.R. 738.

together employers and workers to settle their differences on a mutually agreed basis. The Industrial Truce Resolution 1947, and the Industrial Policy Resolution 1948, refer to the establishment of machinery at all levels by associating workers for advising on fair wages, fair remuneration for capital and conditions of labour. The Government of India to achieve the above avowed objects, established the Central Advisory Council for Industries, consisting of the representatives of the Government, employers, labour, consumers and other interests, to advice the Government on all matters pertaining to industries covered by the Industries (Development and Regulation) Act, 1951. Further the Central Advisory Council for Labour was set up with a view to ensuring the fullest co-operation between labour and capital as was contemplated by the Industrial Truce Resolution of 1947 regarding provisions, *inter alia*, for payment of fair wages. The Council was assisted in its study of the subject of fair wages by a Tripartite Committee on Fair Wages. The Committee on Fair Wages recommended the machinery for fixation of fair wages largely on familiar lines: Tripartite Wages Boards Co-ordinated by an appellate Central Wage Board. In addition, the tripartite labour conference which is held every year to discuss the trend of industrial relations, has had also beneficial effects in formulating labour plan, problems, furthering industrial democracy, recognition of workers' dignity and status, and adoption of measures to maintain industrial peace.

Corresponding to the co-operation at the national level the regional machinery in the States too is patterned on tripartite basis. The State Governments have established State Advisory Boards to cover the entire field of industry within the State concerned. The Industrial Policy Resolution contemplated the establishment of Works Committees and Production Committees so established are of tripartite character consisting of equal number of representatives of employers and workers. Under the Industrial Disputes Act, 1947, the appropriate Government[22], Central or State as the case may be, may by order require employers in the industrial estabishments employing 100 or more workers to set up Works Committees consisting of the representatives of employers and workers. The duty of the Works Committee is to promote measures for securing and preserving amity and good relations between employers and workers. The Industries (Development and Regulation) Act, 1951 also provides for the establishment of development councils at the industry level; these councils are to be constituted in the same way as the Central Advisory Council for Industries and are responsible for recommending production targets, suggesting norms of efficiency, promoting vocational training and incentive measures, etc.

In India the trend of modern labour legislation is an attempt to promote collective bargaining. The Industrial Employment (Standing Orders) Act, 1946 and the Industrial Relations Act, 1951 provide for collective bargaining which enables the parties to negotiate a change in conditions of employment in an amicable atmosphere before any actual dispute arises. But the course of collective bargaining in India itself likewise will be primarily determined by the quick or slow growth of trade unionism. The multiplicity of trade unions is basically connected with illiteracy of the working class. The employers in India are sufficiently organised. But this is not the case with the workers. Consequently in the absence of a strong trade union movement it is difficult if not impossible to enforce bargaining. Therefore, we find a unique method of encouraging collective bargaining through statutory measures. For example the

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22. S. 3, Industrial Disputes Act, 1947.

Bombay Industrial Relations Act, 1946 aims at collective bargaining by conferring representative status on a union commanding allegiance of a minority. The Trade Unions (Amendment) Act (XLV of 1947) provides for compulsory recognition by employers of the representative Trade Unions. Thus a representative Trade Union shall have all the rights of recognised Trade Union in its relation to the employer. The proceedings of the Seventh Session of the Labour Minister's Conference, 1949[23], formulated points for consideration for collective bargaining. The points for consideration were :

(i) the determination of the recognised bargaining agent for employees of a particular industrial unit ;

(ii) the circumstances in which a collective agreement will be regarded as binding upon both the parties, *viz*., the employers and all the employees in that particular industrial unit :

(iii) the duration for which a collective agreement will be regarded as binding;

(iv) the procedure for resolving differences in regard to the interpretation of the terms of collective agreement, and

(v) the procedure for modifying the terms of a collective agreement, when it is about to expire."

Shri V. V. Giri, then Union Labour Minister at the Nainital Conference, 1952, pointed out the desirability of collective bargaining against compulsory adjudication which , he said, should be the very last resort and only in exceptional circumstances. Addressing the General Meeting of the Merchants' Chamber of U.P. on October 20, 1957, Shri Giri pleaded[24], that for maintenance of good industrial relations workers should be partners. Consequently he emphasised the necessity for the creation of a permanent machinery both at the center and at the State level to deal with industrial disputes. He further explained that "the efforts should be made in every industry and in every unit of it to constitute joint standing machinery with equal numbers of representatives of labour as also of employers. The primary task of the body was not only to come into operation whenever a strike or lockout occurred, but to meet at regular intervals and discuss all the issues—production, welfare measures, rationalisation and the like problems pertaining to the industry."

It is said that the growth of collective bargaining is handicaped by the dominant role assigned to compulsory arbitration in the settlement of industrial disputes[25]. It is further argued that the compulsory arbitration has cut at the root of the trade union movement. When workers find that there is a machinery other than their own that would settle their disputes, they hardly have any faith or necessity of it in their union. Therefore, it is said that the removal of compulsory arbitration would help in providing solidarity among workers as that alone would bring them strength to bargain effectively[26]. But so long as the concept of private property in its die-hard form remains, the inequalities will not wither and consequently workers cannot have a say in determining the conditions of service—wages, hours of work, leave rules,

23. *See* Summary of Proceedings of the Seventh Session of the Labour Ministers' Conference, 1949.
24. See *National Herald*, October 20, 1957.
25. S. 10 (1), *Proviso*, Industrial Disputes (Amendment & Miscellaneous Provisions) Act, 1956.
26. *Indian Labour Gazette*, October, 1957, 337.

holidays, amenities for life, protection against exploitation, insurance against casualties and so on. This is possible only through Trade Unions playing a constructive role for labour welfare instead of being instruments in the hands of unscrupulous politicians and reactionary employers, all of whom try to exploit the Unions for their own selfish ends. Therefore the only alternative form of settlement of the disputes on a fair and just basis having regard to prevailing conditions in the industry remains the compulsory adjudication as provided by the State for fair and amicable settlement of the disputes. Till workers are educated to a point where they could understand the usefulness of strong trade union movement essential for industrial democracy and the public opinion regards the movement as one that has come to stay, abolition of compulsory adjudication of labour disputes in the various sectors of planned national economy of India today will not result in good industrial relations.

BOOK REVIEWS.

THE MOTOR VEHICLES ACT, 1939, with notes. Published by Sundaram Industries (Private) Ltd., Madras. (1958), Price Rs. 25.

Road Transport has grown to a major industry in our country and with its programmes of expansion and increasing population the problem of motor transport has gained great importance. The Motor Vehicles Act is a Statute governing the use of motor vehicles on roads either for private purposes or as a trade. With the growth of road transport the Act itself has gained an importance and having regard to the knowledge gained by experience the Act has been amended now and then to meet the needs of present day problems. The clamour and competition for route permits for passenger buses has brought many departmental actions to the scrutiny of Courts of law. The Motor Vehicles Act, as some other legislations of its kind, has been the subject-matter of several decisions of the High Court and the Supreme Court. A book with the up to date amendments and Rules is bound to be of immense use to all concerned. The road transport industry, whether passenger transport or goods transport, has not been of organised growth in this country. Enterprising and far-sighted men, like the founder of the parent concern of the present publishers, and a few others have built up an organised and well developed trade in this line. But the trade is to a great extent still in the hands of individuals or groups who are not so mindful of the needs and convenience of the public. In many cases the management is in uneducated hands, who are liable to fall into the clutches of the law. To them a knowledge of the Act and Rules is of special importance.

The book under review is useful to lawyers and laymen alike. The Act as amended up to date with commentaries under each section and the Rules and several other useful information of general interest contained in the book are quite useful. The paper, printing and get up is excellent and the book is very properly dedicated to the memory of the late Sri T. V. Sundaram Iyengar who can rightly be called a pioneer in the field of motor transport trade in this part of the country.

PARTITION ACT, 1893, by *Manindra Nath Das*, West Bengal Civil Service (Judicial). Published by S. C. Sarkar and Sons (Private) Ltd., 1-C, College Square, Calcutta 12. (1958), Price Rs. 2-50 nP.

The Partition Act is a small enactment containing about half a dozen operative sections and deals with the special powers of Court in suits for partition where partition is impossible with out destroying the intrinsic value of the very property to be divided. It is of importance in partition suits under special circumstances. This small handy commentary on the Act, written in a simple fashion, would be found useful by practitioners.

CRIMINOLOGY, CRIMINAL LAW AND INVESTIGATION by *R. Deb*, B.A., (HONS.) B.L., Chief Law Instructor, Central Police Training College, Mt. Abu. Published by S. C. Sarkar and Sons (Private) Ltd., 1-C, College Square, Calcutta 12. Price Rs. 18.

Investigation of crimes by officials of the State is both a legal and social problem. While investigation as a prelude to prosecution and punishment of the offender is a matter of legal procedure, its value for purposes of learning the background and causes of criminal tendencies, with a view to correct and adjust the environments, is a social and human problem. Officers in charge of this work should be familiar with the legal requirements and formalities of an investigation so that the evidence gathered might be used in an effective prosecution. How often have we heard the Courts say that an offender has escaped his due punishment because of an improper investigation offending against the requirements of the law. The subject is highly technical and requires a study of several important enactments like the Penal Code, Evidence Act, Criminal Procedure Code, etc. All Investigating Officers are not so familiar with the principles of the law. The author

of this work has both the experience and qualification to deal with the subject from a practical standpoint. The author deserves compliment for bringing out a handy volume on the subject on which there are not many works in our country. The subject-matter is dealt with in a simple and lucid way which will be found very useful by Officers of the Police Department and lawyers.

GANGULY'S CIVIL COURT PRACTICE AND PROCEDURE, VI Edn. (1958) by *Shambudas Mitra*, Advocate, Calcutta. Published by Eastern Law House, Private Ltd. Calcutta. Price Rs. 14.

This familiar hand-book known to a generation of practising lawyers, more particularly in Bengal, has appeared again after an interval of over two decades. The utility of a book of this nature as desk referencer needs no special mention. The book contains information on many matters like pleading conduct of suits, including examination of witnesses and marking of documents, execution of decrees, appeals, review, etc. A summary of the more important provisions of some of the Statutes like the Civil Procedure Code, Transfer of Property Act, Constitutional remedies, Provincial Small Causes Courts Act, Succession Act, Guardians and Wards Act, Provincial Insolvency Act, Stamp, Court-fees and Limitation Acts and certain local Acts of Bengal form Part II of the Book. It is needless to mention that the book is written mainly for the use of mofussil practitioners of Bengal and the case-law and notes and local statutory amendments are all noted from that viewpoint. The model forms contained in Part IV of the book would be of guidance to junior practitioners. Part V contains notes on some important rulings, chronological tables and a small glossary of law terms.

THE BANKING COMPANIES ACT, 1949, by *K. M. Ghosh*, Advocate, Calcutta. Published by Eastern Law House, Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 13, 1957, Price Rs. 6.

The Banking Companies Act, 1949, is a codification in the form of a separate enactment of the provisions of the former Indian Companies Act which contained a chapter relating to Banking Companies. This Act has since been amended by several Acts. The commentary under review with Rules and notifications will be found useful by all companies transacting the business of banking in India.

PRINCIPLES OF SALES-TAX LAWS by *Kharag Ram Chaturvedi*, B.L., Published by Eastern Law House (Private) Ltd. 54, Ganesh Chunder Avenue, Calcutta. 13 (1958), Price Rs. 16.

No taxation measure of the Government has come in for public and judicial comment as the Sales-tax Law in recent years. Sales-tax as a source of revenue was hit upon in 1939 by the then Province of Madras and was soon caught up by almost all the other Provinces in course of some few years. By the time the Constitution of India came into force the entire country had some system of levying sales-tax, each state having a slightly modified scheme, both as regards the taxable commodities and the scale of tax. The subject of inter-state sales-tax gained great importance by the decisions of the Supreme Court in the *United Motor's case* which lead to a great deal of procedural complications and all the States became interested in the laws of the other States. The subsequent decisions of the Supreme Court in the *Bengal Immunity case*, however, made a great inroad into the powers of the States to tax inter-state sales and to avoid a great loss to the revenues of the country the Central Sales-tax Act of 1956 had to be passed. Since the coming into force of that Act there hasbeen a number of publications on the Sales-tax Laws of the country and the present volume is the latest in the field. The present book is a commentary on the Bengal Sales-tax Act with a comparative study of the Acts of the other States. The Central Sales-tax Act with the Rules is also included. The book will be found useful by lawyers, accountants and merchants.

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